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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HARLLEL B. JONES,
Petitioner,

vs.

ROBERT SHANKLAND, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Circuit Court's decision is contrary **Wilson v. Garcia**, ___ U.S. ___, 105 S.Ct. 1938 (1985), and the majority of the Circuits interpreting **Wilson**?

II. Whether a claim for relief under 42 U.S.C. § 1983 which is in the nature of malicious prosecution accrues at the time a conditional writ of habeas corpus is granted; the end of the appellate process following the granting of a conditional writ of habeas corpus; the entering of a **nolle prosequi** in the original state trial court; or the issuance of an unconditional writ by the federal habeas corpus court?

III. In a 1983 action involving claims of unconstitutional conduct raised previously in a successful federal habeas corpus action, is a state tolling provision, allowing a one-year limitation period to run upon the district court's grant of bail in the habeas action, inconsistent with federal law and policy and thus properly displaced by a federal equitable rule tolling of the state limitation period until the federal habeas proceeding has terminated and the state decides against retrial or the writ is made unconditional by order of the district court?

LIST OF PARTIES

The Petitioner-Plaintiff in this case is Harllel B. Jones. The Respondent-Defendants are Robert Shankland; James Fuerst; William H. Greene, Jr.; William Kelley; and Robert E. Perry. Though Petitioner Jones believes that the decision of the Circuit Court below was incorrect in finding Appellee-Defendants John T. Corrigan, Robert E. Feighan, Cuyahoga County Prosecutor's Office and Cuyahoga County absolutely immune from suit, no review is sought of the judgment as it applies to them because the issues involved do not present questions of national importance meriting review by this Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit denying Rehearing **En Banc** is unpublished and is reproduced in the Appendix (hereinafter "A.") at A1. The panel decision of the Sixth Circuit is published at 800

F.2d 77 (6th Cir. 1986), and is reproduced at A3. The decision of the U. S. District Court for the Northern District of Ohio is unreported and reproduced at A29.

JURISDICTION

The Sixth Circuit panel decision was issued on September 2, 1986. The Sixth Circuit's decision denying the Petition for Rehearing **En Banc** was issued on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

THE ONE-YEAR STATUTE OF LIMITATIONS:
Ohio Revised Code § 2305.11

"(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, including an action for malpractice . . . or upon a statute

for a penalty or forfeiture after the cause thereof accrued . . . ."

THE FOUR-YEAR STATUTE OF LIMITATIONS:
Ohio Revised Code, § 2305.09

"An action for any of the following causes shall be brought within four years after the cause thereof accrued: (A) For trespassing upon real property; (B) For the recovery of personal property, or for taking or detaining it; (C) For relief on the ground of fraud; (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code."

THE TWO-YEAR STATUTE OF LIMITATIONS:
Ohio Revised Code § 2305.10

"An action for bodily injury or injuring personal property shall be

brought within two years after the cause thereof arose."

THE OHIO TOLLING STATUTE:
Ohio Revised Code § 2305.16

"If a person entitled to bring any action . . . is at the time the cause of action accrues . . . imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed."

STATEMENT OF THE CASE

This case involves the dismissal of a civil damage suit filed by Harllel B. Jones against 11 named defendants on October 29, 1979. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343.

The claims for relief were founded upon damages Mr. Jones received as a victim of the illegal Counterintelligence Program (COINTELPRO) against Black Nationalists. One result of this unconstitutional action by the various defendants was that Petitioner Jones spent five and one-half years in prison prior to being released through a favorable habeas corpus action.

The case was assigned to Magistrate Perelman for general pre-trial supervision on June 3, 1981. The Magistrate issued a Report and Recommended Decision dated July 13, 1983, suggesting that the

entire suit should be dismissed upon the theory that the statute of limitations had run prior to the filing of the suit.

The dates relevant to this decision are as follows:

Oct. 12, 1971: Mr. Jones was arrested. He was held in continuous confinement until the District Court released him on bail in 1977.

Feb. 10, 1977: Order granting habeas corpus relief.

June 24, 1977: Mr. Jones was released on bail.

May 3, 1978: Sixth Circuit affirmed granting of the writ [575 F.2d 1164 (6th Cir. 1978)].

Oct. 2, 1978: Supreme Court denied certiorari [439 U.S. 1164 (1978)].

Oct. 16, 1978: Justice Stewart denied Respondent's motion to suspend order denying certiorari.

Oct. 27, 1978: The State prosecutor made an **ex parte** application to enter a **nolle prosequi** to the charges which were granted by the Court. The date shown is the date of receipt for journalization.

Feb. 12, 1979: The District Court declared the conditional writ unconditional and released Mr. Jones from the restrictions of bail.

Mar. 14, 1979: Last day for the State to appeal the granting of the unconditional writ and

release from bail restrictions.

Oct. 29, 1979: Present suit filed.

By an Order dated July 2, 1984, Chief Judge Battisti dismissed the claims against all the defendants.

An appeal was taken to the United States Court of Appeals for the Sixth Circuit. Issues were raised concerning the time the claims for relief accrued; the applicable statute of limitations; and the tolling of the statute of limitations.

While the appeal was pending, this Court issued its opinion in **Wilson v. Garcia**, 471 U.S. 261 (1985), and supplemental briefs were filed on the issues raised by that case.

By an order issued September 2, 1986, the panel affirmed the decision of the District Court, holding that under **Wilson v. Garcia**, 471 U.S. 261 (1985),

Ohio's one-year statute of limitations for intentional torts, R.C. § 2305.11, was applicable to all § 1983 actions in Ohio. By means of a Petition for Rehearing **En Banc**, Petitioner Jones sought further review of the question of the proper statute of limitations under the mandate of **Wilson** and of the question of when a federal claim under § 1983 accrues. The Circuit Court denied Rehearing **En Banc** and Rehearing on October 20, 1986. This matter is presently before the Court on Petition for Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Sixth Circuit's panel decision conflicts with the decisions of other Circuits, one of its own cases, and this Court's decision in Wilson v. Garcia

In **Wilson v. Garcia**, 471 U.S. 261 (1985), this Court directed the Federal courts to "select, in each State, the one most appropriate statute of limitations for all Section 1983 claims." (Emphasis added.) In their efforts to follow the mandate of **Wilson**, the Circuit Courts have produced conflicting decisions. As noted by the D.C. Circuit:

> "There appears to be a growing split in the circuits as to whether general tort statutes of limitations or intentional tort limitations periods should apply in § 1983 cases . . ." **Banks v. Chesapeake and Potomac Telephone Co.**, 802 F.2d 1416, 1427 (D.C. Cir. 1986).

These conflicts have been documented by a number of dissents from denials of certiorari. **See Preuit & Mauldin v. Jones**,

___ U.S. ___, 106 S.Ct. 893 (1986) (White, J., dissenting); **Mulligan v. Hazard**, ___ U.S. ___, 106 S.Ct. 2902 (1986) (White and Marshall, JJ., dissenting); and **County of Wayne v. Carroll**, ___ U.S. ___, 107 S.Ct. 330 (1986) (White, J., dissenting).

Though the fact that the wording of the individual state statutes may be somewhat different, and may even contain different common-law torts, the characterization by the D. C. Circuit of a division between those courts choosing statutes of limitations applicable to intentional torts (defamation, assault and battery, false imprisonment, etc.) and those choosing statutes of limitations of a more general nature (bodily injury, personal injury, or residuary statutes) is apt.

Of most concern is the inter-Circuit conflict among the Circuits. The First,[1] Second,[2] Eighth,[3] Tenth,[4] and D.C.[5]

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[1] **Small v. The Inhabitants of the City of Belfast**, 796 F.2d 544 (1st Cir. 1986) (applying the Maine residuary statute of limitations).

[2] **See Villante v. Department of Corrections of City of New York**, 786 F.2d 516, 520, n.2 (2d Cir. 1986) (dicta rejecting the intentional tort statute and applying the residuary statute applicable to all other injuries to persons). **See also Lee v. Coughlin**, 643 F. Supp. 546 (W.D. N.Y. 1986) (following the dicta in **Villante**).

[3] **Farmer v. Cook**, 782 F.2d 780 (8th Cir. 1986) (applying Missouri residuary statute of limitations).

[4] **Mismash v. Murray City**, 730 F.2d 1366 (10th Cir. 1984) (en banc) (applying Utah's residuary statute of limitations), **cert. denied**, 471 U.S. 1052 (1985); **Hamilton v. City of Overland Park**, 730 F.2d 613 (10th Cir. 1984) (en banc) (applying Kansas residuary statute of limitations), **cert. denied**, 471 U.S. 1052 (1985); and **McKay v. Hammock**, 730 F.2d 1367 (10th Cir. 1984) (en banc) (applying Colorado's residuary statute of limitations).

[5] **Greenfield v. District of Columbia**, 623 F. Supp. 47 (D.D.C. 1985) (applying District of Columbia residuary statute of

Circuits have all applied the more general tort statutes of limitations. The Fifth[6] and the Eleventh[7] Circuits have applied the more limited statutes of limitations for intentional torts.

Of similar significance is where such a conflict exists, without acknowledgement or an effort at reconciliation, within the Circuit itself. **See County of Wayne v. Carroll**, ___ U.S. ___, 107 S.Ct. 330 (1986) (White, J., dissenting), recognizing a conflict within the Sixth

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limitations for torts). **See also Hobson v. Brennan**, 625 F. Supp. 459 (D.D.C. 1985) (applying residuary statute of limitations for torts to **Bivens** claims).

[6] **Gates v. Spinks**, 771 F.2d 916 (5th Cir. 1985) (applying Mississippi's statute of limitations for intentional torts), **reh. denied**, 775 F.2d 1168 (5th Cir. 1985), **cert. denied**, 106 S.Ct. 1378 (1986).

[7] **Jones v. Preuit & Mauldin**, 763 F.2d 1250 (11th Cir. 1985), **cert. denied**, ___ U.S. ___, 106 S.Ct. 893 (1986) (White, J., dissenting) (applying Alabama's six-year statute of limitations for intentional torts).

Circuit between its decisions in **Mulligan v. Hazard**, 777 F.2d 340 (6th Cir. 1985) (applying one-year intentional tort statute), **cert. denied**, ___ U.S. ___, 106 S.Ct. 2902 (1986), and **Carroll v. Wilkerson**, 782 F.2d 44 (6th Cir. 1986) (applying three-year catch-all statute for injury to person or property), **cert. denied sub. nom., County of Wayne v. Caroll**, ___ U.S. ___, 107 S.Ct. 330 (1986). **Also compare Shorters v. City of Chicago**, 617 F. Supp. 661 (N.D. Ill. 1985) (applying five-year residuary statute of limitations) with **Anton v. Lehpamer**, 787 F.2d 1141 (7th Cir. 1986).

Since the instant case followed, under the doctrine of **stare decisis** (800 F.2d at 80; A13) the decision of the panel decision in **Mulligan**, it is part of the intra-Circuit conflict within the Sixth Circuit.

Thus, there are both inter- and intra-Circuit conflicts among the Circuits which, especially in view of the volume of § 1983 cases filed in the federal courts, justify the granting of certiorari to review the merits of this issue.

If the Court does grant review, Petitioner Jones believes that the Court will find that the majority of the Circuit Courts are correct in applying the more general statutes of limitations and in rejecting the statute of limitations tailored for intentional torts. In the case at bar, for example, the panel held that former Ohio R.C. § 2305.11 [Ohio's statutes for intentional torts] (libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice) was the

applicable statute of limitations for § 1983 actions brought in Ohio.[8]

Yet in **Wilson v. Garcia**, this Court directed the lower federal courts to apply the statute "most" appropriate and that was to be the one would be broad enough to encompass "all" § 1983 claims. 471 U.S. at 775. In the text of the **Wilson** decision, this Court discussed several varieties of § 1983 actions, including: (1) discrmination in public employment on the basis of race or the

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[8]As noted in **Mulligan v. Hazard**, 777 F.2d 340, 343, n.4 (6th Cir. 1985), **cert. denied**, ___ U.S. ___, 106 S.Ct. 3902 (1986), Ohio R.C. § 2305.11 was amended to remove assault and battery actions from its scope for inclusion in new 2305.111. Under both statutes, the statute of limitations for assault and battery was one year. Because this case was decided upon R.C. § 2305.11, all references will be to that statute. The issues presented by R.C. § 2305.11 are exactly the same, however, as those presented by an examination of R.C. § 2305.111.

exercise of First Amendment rights; (2) seizure of chattels without advance notice or sufficient opportunity to be heard; (3) deliberate indifference to the serious medical needs of prisoners; (4) discharge or demotion without procedural due process; and (5) mistreatment of school children.[9] Of the five types of 1983 actions specifically mentioned in the text of the **Wilson** opinion, only one (medical malpractice) would arguably fall within the purview of § 2305.11. Thus, to adopt § 2305.11 runs contrary to the teachings of **Wilson**. The statute is far too narrow to encompass all civil

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[9] In a footnote, the **Wilson** Court also alluded to at least 16 other causes of action which have been alleged under § 1983. **Wilson v. Garcia, supra** at n.31.

Of these 16 causes of action, only the actions to restrain prosecutions would appear to fall within the narrow parameter of ORC § 2305.11.

rights claims under § 1983 and, hence, must be rejected. The only available statutes which would be broad enough to encompass these claims is the four-year residuary statute for other torts [O.R.C. § 2305.09] or the two-year statute for bodily injury [O.R.C. § 2305.10].

II.

A claim sounding in malicious prosecution for relief under 42 U.S.C. § 1983 accrues upon the granting of an unconditional grant of habeas corpus

The claims presented in the instant case all flowed from an unconstitutional conviction and subsequent cover-up of the suppression of exculpatory evidence. Thus, it is in the nature of an action for malicious prosecution. It is well established that an action for malicious prosecution accrues when the underlying actions are terminated in plaintiff's favor. The question for consideration is when, in a case such as the one at bar, the claim is terminated in the plaintiff's favor.

This appears to be an issue of first impression. Not only did counsel for the Petitioner fail to find any controlling authority upon this precise question, but none was offered by counsel representing

the Respondents below. Further, the panel opinion, while containing an elaborate discussion of the question of whether a civil rights action could be filed before the successful conclusion of related habeas corpus proceedings, does not suggest when the claim for relief actually accrued and cites no authority for its general conclusion that the claim must have accrued at some designated time more than a year before the suit was commenced (800 F.2d at 83; A25).

At the very least, a reasonable bench mark for the determination of the underlying action in Plaintiff Jones' favor would be the date the **nolle prosequi** was entered in the state Court of Common Pleas where the initial adverse judgment was entered against him.

In the case at bar, this Court may take judicial notice of the copy of the State Court's Order of October 27, 1978,

entering a **nolle prosequi** dismissing that action[10] (A72). Even under a one-year statute of limitations, the present suit should have been filed on the day it was filed: October 29, 1979.[11]

More reasonably, however, the claim could be said to have accrued only upon the issuance of the unconditional writ of habeas corpus. It should be noted that the 90 days for re-trial specified by this Court's initial conditional writ

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[10] There are three dates appearing on that document. The heading dates it October 17, 1978. The date under the judge's name is October 20, 1978. The stamp of the Clerk "Received for Filing" is dated October 27, 1978. The latter date is the significant one here because under Ohio law, orders of the Court are effective only when received and filed by the Clerk. **E.g., State v. Herder**, 65 Ohio App.2d 70, 415 N.E.2d 1000 (1979) (Syllabus 1); **In re Hopple**, 13 Ohio App.3d 54, 468 N.E.2d 129 (1983) (Syllabus 3).

[11] October 27, 1979, was a Saturday when the courts were closed and under Ohio law the time was thereby extended until Monday, October 29, 1979.

were not immutable. **E.g., Gardner v. Forister**, 472 F. Supp. 1 (W.D. N.C. 1979) (absolute writ denied even though defendant not re-tried within 60 days as required by the conditional writ); **Bruce v. Estelle**, 707 F.2d 155 (5th Cir. 1983), **cert. denied**, 464 U.S. 963 (1983) (after initially granting 90 days in which petitioner was to be re-tried, the District Court granted an additional 90 days). The practice in many Federal District Courts is to simply order re-trial within a "reasonable" time.

The state prosecutors always had the option of going to the District Court and seeking relief from judgment until the Court declared the writ unconditional. Though counsel for Mr. Jones would have opposed such an action, it is not inconceivable that if the State were to demonstrate good cause (such as the inability to locate a key witness whose

location was subsequently discovered), the Court could have granted such a motion.

Thus, "finality" did not occur in this case until the Court's order of February 12, 1979, making the writ unconditional or 30 days thereafter when the State's right to appeal that order expired. It is upon one of these dates that the claim for relief accrued and the statute of limitations began to run.

III.

This case presents important questions concerning the proper determination of when a state tolling provision is inconsistent with federal law and policy, and thus inapplicable in a section 1983 case sounding in malicious prosecution, and the determination of an appropriate federal tolling rule in this type of case.

A state limitation period or related tolling provision is inconsistent with federal law within the meaning of 42 U.S.C. § 1988, and thus inapplicable in a section 1983 case, when it significantly impairs or frustrates the policies of deterring unconstitutional abuse of state power and affording compensation when it occurs. **Board of Regents v. Tomanio**, 446 U.S. 478, 487-488 (1980); **Robertson v. Wegmann**, 436 U.S. 584, 590-591 (1978); **Occidental Life Insurance Co. v. EEOC**, 432 U.S. 355, 367 (1977). In making that determination, consideration must be given to whether the state rule, when coupled with the "practicalities of

litigation," insures "the full availability of a judicial forum" for the § 1983 claim. **Burnett v. Gratton**, 468 U.S. 42, 50 (1984).

Consideration must also be given to related federal policies such as federalism, uniformity and certainty. **Board of Regents v. Tomanio, supra**, at 489-491. **See also Wilson v. Garcia**, 471 U.S. 261 (1985). The same considerations apply when state law is displaced and a federal equitable rule is fashioned, since the objective remains that of insuring "that neutral rules of decision will be available to enforce" § 1983 actions. **Wilson v. Garcia, supra** at 269. The decision below conflicts with the decisions of this Court by affording inadequate attention to these relevant considerations.

In holding that Petitioner's § 1983 suit, filed on October 29, 1979, was

time-barred, the court below gave two reasons. First, assuming without deciding that the Ohio tolling statute applied, the suit was untimely because, as construed by the court, the tolling statute suspended the one-year limitation period only until Petitioner was released on bail in the habeas corpus proceeding on June 24, 1977 (A17). Second, assuming without deciding that a federal equitable rule applied, the suit was still untimely since the court's contemplated rule would have suspended the state limitation period only until the State had been denied certiorari in the habeas action or reconsideration of that Order on October 2 and October 16, 1978, respectively (A24-25).

In suggesting that the Ohio tolling statute was applicable to bar Petitioner's claim, the court failed to properly consider the practicalities of litigation presented in the context of

this type of case. In addition to the usual burdens which led this Court to reject a six-month state limitation period in **Burnett v. Gratton, supra**, and which have led one court to conclude that any state limitation period less than two years is inconsistent with federal policy, **Pauk v. Board of Trustees of City University of New York**, 654 F.2d 856, 862 (2nd Cir. 1981), **cert. denied**, 455 U.S. 1000 (1982); **Lee v. Coughlin**, 643 F. Supp. 546, 549 (W.D. N.Y. 1986), Petitioner faced others. At the time of his release on bail, he had been imprisoned for nearly six years, and his attention and resources were understandably directed at opposing the State's efforts to reimprison him, not just by appealing the award of the writ and the threat of reprosecution, but as well by a separate appeal of the bail determination.

Moreover, had Petitioner filed his

§ 1983 suit within one year of his release on bail, and thus prior to this Court's denial of the State's petition for certiorari on October 2, 1978, he faced the prospect of having his claims dismissed on grounds of res judicata. **Allen v. McCurry**, 449 U.S. 90 (1980); **Migra v. Warren City School District Board of Education**, 465 U.S. 75 (1984). If that did not occur, he would likely have encountered an exercise of absention.

Indeed, many courts, including the court below, have by now relied on the decisions in **Preiser v. Rodriquez**, 411 U.S. 475 (1973); **Younger v. Harris**, 401 U.S. 37 (1971); and **dicta** in **Tower v. Glover**, 467 U.S. 914, 923 (1984), to require absention, pending resort to federal habeas actions and exhaustion of state remedies, in § 1983 damage cases involving claims that question the

legality of a state conviction, pending prosecution or custodial restraint. **See Guerro v. Mulhearn**, 498 F.2d 1249 (1st Cir. 1974); **Alexander v. Ware**, 714 F.2d 416, 419 (5th Cir. 1983); **Hadley v. Werner**, 753 F.2d 514, 516 (6th Cir. 1985); **Hanson v. Heckel**, 791 F.2d 93 (7th Cir. 1986); **Ybarra v. Reno Thunderbird Mobile Home Village**, 723 F.2d 675, 682 (9th Cir. 1984); **Parkhurst v. State of Wyoming**, 641 F.2d 775, 777 (10th Cir. 1981). **But see Suggs v. Brannon**, 804 F.2d 274 (4th Cir. 1986) (taking opposite approach in part because of concern that deferral might cause claims to be time-barred).

In effect, application of the Ohio tolling provision in this case forced resort to federal court at a time when it was exceedingly difficult for Petitioner to do so and when it was doubtful that a federal forum was available. As such the

suggestion by the court below that this provision could be properly applied to determine the timeliness of Petitioner's § 1983 action presents a serious question of conflict in principle with this court's decisions. The question is made more serious by the fact that among the class of confined § 1983 litigants the rule could only work to the prejudice of one whose habeas petition was so meritorious that it permitted the unusual grant of release on bail.

By ruling that Petitioner's § 1983 action was untimely, even if a federal equitable tolling principle applied, the court below again failed to properly consider the practicalities of litigation in this type of case, and federal policy that may have limited the availability of a federal forum until such time as the State formally decided against retrial or the writ of habeas corpus was made uncon-

ditional by order of the district court. Until either of those events occurred, Petitioner faced the very real prospect of reprosecution on charges carrying a penalty of life imprisonment.

Indeed, until the latter event occurred, there remained some threat of prosecution since the State's filing of a **nolle prosequi** on October 27, 1979, did not preclude subsequent prosecution under state law and the extant order awarding Petitioner a conditional writ of habeas corpus was merely executory. **See Gardner v. Forister**, 472 F. Supp. 1 (W.D. N.C. 1979) (absolute writ denied even though petitioner not retried within 60 days as required by conditional writ), **Bruce v. Estelle**, 707 F.2d 155 (5th Cir.), **cert. denied**, 104 S.Ct. 400 (1983) (after initially granting 90 days in which petitioner was to be retried district court granted an additional 90 days).

Moreover, under the rule suggested by the court below--namely, tolling of the one-year period only until denial of the state's petition for certiorari in the habeas action--§ 1983 plaintiffs like Petitioner would face the risk of being subjected to retaliatory reprosecution for having filed suit, thus exacerbating the injuries already suffered.

In addition, until the State formally decided against reprosecution, there was in effect a pending state criminal prosecution calling into play "the fundamental policy against federal interference with state criminal prosecutions." **Younger v. Harris, supra**, at 46. Although this Court has not decided whether a federal court should abstain from deciding a § 1983 damage suit involving claims that question the legality of a pending prosecution, many courts, as noted above, have. Moreover,

although abstention would be inappropriate if the State prosecution did not afford an opportunity to raise the § 1983 claims, it might be expected that in many situations where, as here, the habeas court has declined to rule on all claims presented in a petition, it will be the case that certain of the § 1983 claims, never before considered, could be the basis for a motion to dismiss the reprosecuted charges.

In any event, this case presents an important question concerning the federal rule of tolling to be fashioned in cases of this sort. Had the court below accepted the rule urged upon it by Petitioner, the § 1983 action would have been timely brought even under the one-year limitation period.

IV.

Conclusion

Each of the three questions presented for review merit the allowance of the writ of certiorari to the Sixth Circuit. The question concerning the application of **Wilson** to determine the proper statute of limitations involves intra- and inter-Circuit conflicts which only this Court can resolve. The related questions of the time of accrual of § 1983 actions and the application of the doctrine of equitable tolling present questions of national importance. Consequently, Petitioner Jones

respectfully requests that review be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HARLLEL B. JONES,
Petitioner,

vs.

ROBERT SHANKLAND, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION

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ORDER OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-3623

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(Filed October 20, 1986)

HARLLEL B. JONES,

Plaintiff-Appellant,

v.

ROBERT SHANKLAND, ET AL.,

Defendants-Appellees.

O R D E R

BEFORE: ENGEL, MERRITT AND KENNEDY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-3623

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harllel B. Jones,

Plaintiff-Appellant,

v.

Robert Shankland, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed September 2, 1986
[Published at 800 F.2d 77
(6th. Cir. 1986)

Before: **ENGEL, MERRITT and KENNEDY,** Circuit Judges.

ENGEL, Circuit Judge. Harllel B. Jones appeals a judgment of the United States District Court for the Northern District of Ohio, granting defendants' motions to dismiss and for summary judgement in his civil rights action. In this appeal, Jones contends that the district court

BEST AVAILA

erroneously held that his claims against four defendants were barred by the applicable statute of limitations and the remaining county defendants were absolutely immune from civil suit. We affirm.

A complete recital of events which brought about Jones' conviction of second degree murder in the Ohio state courts and his ultimate release upon issuance of a federal writ of habeas corpus is chronicled in **Jones v. Jago**, 428 F. Supp. 405 (N.D. Ohio 1977), **aff'd**, 575 F.2d 1164 (6th Cir.), **cert. denied**, 439 U.S. 883 (1978); and **Jago v. United States District Court**, 570 F.2d 618 (6th Cir. 1978).

I.

On October 12, 1971, Harllel Jones was arrested and held to answer an indictment charging him with first degree murder and shooting with intent to kill.

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The state maintained that Jones had instigated the fatal shootings of two men on August 7, 1970, in retaliation for the death of a member of a political group which he had organized. On March 28, 1972, a jury convicted Jones of second degree murder and of shooting with intent to kill or wound. After exhausting his state remedies, Jones filed a petition for habeas corpus in the federal court in Cleveland charging, among other constitutional errors, that the prosecution had unconstitutionally suppressed exculpatory evidence.

During Jones' prosecution the state had refused to disclose a statement which the defense specifically requested. That statement, by fifteen year old juvenile who had been present at the August 7 shootings, contained that person's recollections of that evening but made no mention of any involvement on the part of Jones. On February 10, 1977, the

district court granted Jones' writ, **Jones v. Jago**, 428 F. Supp. 405 (N.D. Ohio 1977), and on June 24, 1977, Jones was released from prison on bond. On February 2, 1978, the Sixth Circuit rejected the prosecution's appeal of Jones' release, **Jago v. U.S. District Court, Northern District of Ohio, East Division, at Cleveland**, 570 F.2d 618 (6th Cir. 1978), and on May 3, 1978, the Sixth Circuit affirmed the district court's decision granting a conditional writ of habeas corpus, **Jones v. Jago**, 575 F.2d 1164 (6th Cir. 1978). The state's petition for a writ of certiorari was denied by the United States Supreme Court on October 2, 1978. **Jago v. Jones**, 439 U.S. 883 (1978). Finally, on February 12, 1979, the district court entered a "final" order unconditionally releasing Jones, the state having determined not to retry him.

On October 29, 1979, Jones filed a

civil action in the United States District Court under 42 U.S.C. §§ 1983, 1985(2) and (3) and 1986. He alleged that the earlier prosecution violated his rights under the First, Fourth, Fifth, Sixth, Eight, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments. He also alleged pendent state claims of false imprisonment, intentional infliction of emotional distress, malicious prosecution, abuse of process, invasion of privacy and defamation. Jones named eleven defendants. Three defendants, Robert Shankland, Thomas Mahon and James Fuerst, were officers of the police department of the City of Cleveland and were sued individually. Defendants William H. Greene, Jr. and William Kelley were each agents of the Federal Bureau of Investigation assigned to the Cleveland Field Office of the FBI. Green and Kelley were sued individually. Robert Perry was alleged to be an

undercover agent who worked for the Federal Bureau of Investigation as an informant. He was sued individually. Defendants John T. Corrigan, Robert E. Feighan and William J. Coyne were all employed by Cuyahoga County. Corrigan was the duly elected prosecutor for the county. Feighan and Coyne were assistant Cuyahoga County prosecutors. Corrigan, Feighan and Coyne were sued in both their individual and official capacities. Also named were the "Cuyahoga County Prosecutor's Office" and Defendant Cuyahoga County, the "Parent-Governmental" entity of the Cuyahoga County Prosecutor's Office. The liability of the prosecutor's office and the county was alleged to be "predicated upon the actions of defendant Corrigan."

Jones' lengthy complaint alleged that the named defendants acted either solely or in conspiracy to infringe his First Amendment rights, failed to

disclose exculpatory information, procured false testimony, failed to correct perjured testimony, caused a conflict of interest for defense counsel and then did not disclose that conflict to Jones, put a "spy" in the defense camp and "covered up" the foregoing allegedly unconstitutional actions.

On July 2, 1984, Chief Judge Frank J. Battisti granted the city and federal defendants' motions to dismiss and a motion for summary judgment which had been filed by the county defendants. He held that Jones' claims against the city and federal defendants were governed by the one-year statute of limitations contained in Ohio Rev. Code § 2305.11. Concluding that Jones' cause of action accrued at the very latest on October 2, 1978, when the Supreme court denied certiorari, Judge Battisti found the suit time-barred. While Judge Battisti also concluded that the county defendants had

waived the statute of limitations defense by not raising it in their pre-answer motion to dismiss, he nonetheless granted the county defendants' motion for summary judgment on the ground that they were entitled to absolute immunity for their actions in prosecuting the criminal case.

On appeal, Jones contends that the district court should have examined each claim made to determine which Ohio statute of limitations provision should have been applied. He argues also that his cause of action did not accrue until February 12, 1979, when the district court granted an unconditional writ or thirty days thereafter when the state's right to appeal that order expired. Moreover, he claims that the statute of limitations was tolled by Ohio Rev. Code §2305.16 because although physically free since June 24, 1977, he had remained constructively "imprisoned" under the restrictions of bail until the issuance

of the unconditional writ. Finally, he argues that the county defendants were not immune from suit.

II.

We first conclude that Chief Judge Battisti was entirely correct in his determination that the individual county prosecutors were absolutely immune from personal liability in damage suits brought pursuant to 42 U.S.C. § 1983. **Imbler v. Pachtman**, 424 U.S. 409 (1976).

Jones argues that many of the claims charged against those in the prosecutor's office relate to their role as administrator or investigative officers, rather than as advocates. His complaint contains essentially allegations of failing to disclose exculpatory and other information concerning witnesses, procuring false testimony, failing to correct perjured testimony, causing a conflict of interest for defense counsel,

not disclosing that conflict to Jones, putting a "spy" in the defense camp, and "covering up" those allegedly unconstitutional actions.

The foregoing actions appear to us to be clearly within the scope of immunity contemplated by the Supreme Court in **Imbler**. The use of perjured testimony and the non-disclosure of exculpatory information are certainly entitled to absolute immunity. **See Imbler**, 424 U.S. at 431 n.34. The conflict of interest problems and the spy allegations would also seem to be related to the acts of an advocate and thus come within the area of prosecutorial immunity as do the cover up allegations which merely appear to be restatements of the prosecution's claimed failure to disclose exculpatory information.

III.

The trial judge's determination that

Jones' claims against the remaining defendants were governed by Ohio's one-year statute of limitations as contained in Ohio Rev. Code § 2305.11 has since been fully reaffirmed by the Supreme Court's determination in **Wilson v. Garcia**, 105 S. Ct. 1938 (1985), that actions under section 1983 are best characterized as personal injury actions and subject to the state statutes of limitations for those types of claims. While there are two conceivable statutes of limitations in Ohio bearing on personal injury claims, one for negligent claims and one for intentional claims, our court in **Mulligan v. Hazard**, 777 F.2d 340 (6th Cir. 1986), has recently held, consistent with Judge Battisti's ruling here, that the one-year limitations period of Ohio Rev. code § 2305.11 is more appropriate. We agree and accept **Mulligan v. Hazard** as **stare decisis** in our circuit on the question of Ohio's

most nearly analogous statute. **Mulligan v. Hazard** is also authority in our circuit that **Wilson v. Garcia** is to be applied retroactively, dispelling any question of the applicability of the one-year period to the present case.

IV.

Having found that the one-year statute is applicable, the question remains whether Jones' civil rights action, which was commenced in the district on October 29, 1979, was nevertheless timely as having been commenced within one year from the time it accrued. In support of this claim, it is argued that the statute should not begin to run until February 12, 1979, the date on which the court entered a "final" order unconditionally releasing Jones after the state determined not to retry him. We disagree.

In support of the latter position,

Jones claims first that accrual of his cause of action was tolled by his imprisonment. Under Ohio Rev. Code § 2305.16, "If a person entitled to bring any action mentioned in such sections [including section 2305.11], unless for penalty or forfeiture, is at the time the cause of action accrues,...imprisoned ...such person may bring it within the respective times limited by such sections after such disability is removed. . .."

In actions brought under section 1983, state tolling statutes apply where the most nearly analogous state statute of limitations is borrowed, to the extent that the tolling provisions are not inconsistent with federal policy underlying section 1983. **Board of Regents of the University of the State of New York v. Tomanio**, 446 U.S. 478, 484-85 (1980); **see also Austin v. Brammer**, 555 F.2d 142 (6th Cir. 1977). It is undisputed, however, that Jones was

physically free from restraint since his release on June 24, 1977. **Jago v. United States District Court**, 570 F.2d 618, 619 n.1 (6th Cir. 1978). We are cited no authority in Ohio's courts or otherwise to the effect that the statutory period was nevertheless still tolled because thereafter and until final release on February 12, 1979, Jones was under the "restraint" of bail.

Jones has supplied no support for his proposition that the disability of imprisonment referred to in section 2305.16 includes time spent on bail and logic does not support such a claim. The concerns prompting the tolling of a statute while one is in prison simply are not applicable when the party is free on bail. He is thereafter not denied any access to counsel, nor is he hindered from investigating the facts concerning his claim or from starting suit on his own behalf. **Accord Kaiser v. Cahn**, 510

F.2d 282 (2d Cir. 1976)

Finally, Jones claims that the statute of limitations could not begin to run nor could his cause of action accrue until there had been a full termination his habeas corpus proceedings, relying primarily upon **Preiser v. Rodriguez**, 411 U.S. 475 (1973). There Justice Stewart held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus," 411 U.S. at 500, and not an action under 42 U.S.C. § 1983. While the Court found that to allow a section 1983 suit to proceed in cases challenging the propriety of a state prisoner's incarceration would frustrate the congressional intent reflected in the habeas statutes, it restricted its

holding to cases seeking only equitable relief. In this action, of course, only damage relief is sought by Jones, although it is for deprivations which arose not from the conditions of his confinement, but from allegations going to the constitutionality of the proceedings which led to his incarceration. Nonetheless, the trial court recognized that exhaustion of remedies is not a prerequisite to a section 1983 action. The prisoner in **Preiser** had argued that the court's holding could deprive them of any opportunity to receive damages if no damage remedy was available at state law. They based their argument upon the principles that damages are not available in federal habeas corpus proceedings, and that a subsequent section 1983 could be barred by **res judicata** if the state court determination is adverse to their claims. The Court responded:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief--restoration of their good-time credits--and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release--the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement or prior exhaustion of state remedies. Cf. **Ray v. Fritz**, 468 F.2d 586 (CA2 1972).

411 U.S. at 494. The Court further noted that a suit for damages under section 1983 and a habeas claim may be pressed simultaneously in federal court:

> If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his

> claim relating to the conditions of his confinement. **Id.** at 499 n.14.

In **Wolff v. McDonnell**, 418 U.S. 539, 553-55 (1974), the Supreme Court interpreted this language in **Preiser**, concluding that a section 1983 suit for damages may be litigated outside a habeas proceeding. In **Wolff**, like **Preiser**, a state prisoner alleged that he and others had been unconstituionally disciplined and thereby deprived of "good time" credit. However, unlike the plaintiff in **Preiser**, the plaintiff in **Wolff** sought declaratory relief and money damages as well as an injunction. The Supreme Court held that the injunctive relief sought was foreclosed, as in **Preiser**, but that the declaratory judgment and damage claims could proceed:

> **Preiser** expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S. at 499 n.14. Respondent's damages claim was therefore properly before the District Court and

> required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgement as a predicate to a damages award would not be barred by **Preiser** . . .
>
> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

418 U.S. at 554-555 (footnotes omitted).

While the language in **Wolff** could be read as holding that a section 1983 suit for damages may be brought even if the damage claim is dependant upon the constitutionality of the prisoner's confinement, the Supreme Court recently acknowledged that it has not yet determined whether "a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court

attacks on the conviction itself." **Tower v. Glover**, 467 U.S. 914, 923 (1984).

In **Hadley v. Werner**, 753 F.2d 514 (6th Cir. 1985), a panel of our court followed the decision of the First Circuit in **Guerro v. Mulhearn**, 498 F.2d 1249 (1st Cir. 1974), by holding that in a section 1983 suit a federal court must "stay its hand where disposition of the damage action would involve a ruling implying that a state conviction is or would be illegal." 753 F.2d at 516 (quoting **Guerro**, 498 F.2d at 1252). Our circuit in **Hadley**, concluding that the reasoning of **Preiser** combined with the policy considerations underlying **Younger v. Harris**, 401 U.S. 37 (1971), required the district court to stay its hand "where disposition of the damage action would involve a rule implying that a state conviction is or would be illegal," 753 F.2d at 516, and ordered as specific relief in that case the vacation of the

district court's ruling that the plaintiff there had failed to state a claim upon which relief could be granted. At the same time, it affirmed the district court's dismissal of Hadley's claim, without prejudice however to his opportunity to refile his claim under section 1983 if and when he established through a writ of habeas corpus that he was denied a constitutional right. The specific relief accorded in **Hadley** would normally raise some question whether, therefore, the accrual of a petitioner's cause of action for damages based upon constitutional violations which also affected his liberty, would be suspended during the entire time necessary to pursue the habeas action to a successful conclusion. In other contexts, however, the Supreme Court in **Fornaris v. Ridge Tool Co.**, 400 U.S. 41 (1970), and our circuit in **Muskegon Theatres, Inc. v. City of Muskegon**, 507 F.2d 199 (6th Cir.

1974), held it error to have dismissed outright, even without prejudice, causes of action brought under the Civil Rights Act where it was determined that abstention pending the resolution of state proceedings was appropriate. There is support and logic for support in both views. We need not, however, decide here whether a dismissal without prejudice or the retention while abstaining from action is preferable for we determine that in all events the habeas corpus case had been fully concluded more than one year before the suit was started.[1]

As noted by the district court, the Supreme Court denied certiorari on

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[1] **See also Johnson v. Railway Express Agency**, 421 U.S. 454 (1975), where, in a different context, the court held that commencement of agency proceedings under Title VII, 42 U.S.C. §§ 2000e, **et seq.**, did not toll the limitations period for a claim brought under 42 U.S.C. § 1981 challenging the same conduct. The Court suggested as a possible solution "that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation

October 2, 1978; on October 16, 1978, Justice Stewart refused to suspend the denial of the application for writ of certiorari. Without necessarily holding that the one year period should be calculated as running from either of those dates in contrast to some earlier date, it is sufficient to say that under any reasonable construction of finality, Jones had had well over a year in which to act before commencing the district court suit on October 29, 1979. The district court's order of February 12, 1979, in final conclusion of the habeas proceedings, was nothing more than an administrative act of closing the file. The result had already been fully and totally adjudicated. We see no reason to string out the time for the statute to run by conceiving of every possible method by which the ultimate result in

---

and voluntary compliance have been completed." 421 U.S. at 465.

the habeas case might have been forestalled.

AFFIRMED.

JUDGMENT ENTRY OF THE U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

(Filed July 2, 1984)

HARLLEL B. JONES,	)	C79-2040
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
ROBERT T. SHANKLAND, et al.,	)	
	)	
Defendants.	)	Judgment Entry

BATTISTI, C.J.

In accordance with the Memorandum Opinion and Order filed on July 2, 1984,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the County defendants' motion to dismiss, the Federal defendants' motion to dismiss and the City defendants' motion for summary judgment are hereby granted.

IT IS FURTHER ORDERED that the action against defendant Robert Perry is hereby dismissed.

Frank J. Battisti
Chief Judge

OPINION AND ORDER OF THE U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
(FILED JULY 2, 1984)

HARLLEL B. JONES	:	C-79-2040
Plaintiff,	:	
-vs-	:	MEMORANDUM
	:	OPINION AND
ROBERT T. SHANKLAND, et al.	:	ORDER
Defendants	:	

Battisti, C.J.

Before the Court are motions to dismiss and for summary judgment filed by various defendants in the above-captioned matter. Originally, the case was assigned to U.S. Magistrate David Perelman for pretrial supervision pursuant to 28 U.S.C. § 636(b)(1)(B). On July 14, 1983, the Magistrate submitted a Report and Recommendation Decision which analyzed the issues raised in defendants' motions and included a preliminary determination thereon. In conformity

with Local Rule 19.04(3), plaintiff filed timely objections to the Report and Recommended Decision. Thereafter, defendants filed briefs in opposition to plaintiff's objections and requested that the Court adopt the findings of fact and conclusions of law recommended by the Magistrate.

The Court finds the manner in which defendants investigated and prosecuted Plaintiff Jones leaves much to be desired. Nonetheless, upon due consideration, the Court grants the Motion of the City, County and Federal defendants for the reasons set forth below.

I.

BACKGROUND

A.

In order to fully comprehend the issues currently before the Court, it is essential to set out the history of this

case. The events out of which this matter developed began to unfold on October 12, 1971, when the plaintiff, Harllel Jones, was arrested pursuant to an indictment charging him with first degree murder and with shooting with intent to kill or wound. The government maintained that plaintiff had instigated the fatal shootings of John Howard Smith and Harlow Tate early on the morning of August 7, 1970. The prosecution charged that, on the evening of August 6, 1970, plaintiff had called a "red-alert" meeting of a political organization known as the Afro Set. At that meeting, plaintiff allegedly urged the members of the organization to retaliate for the death of an Afro Set member who had been fatally shot by a security guard. According to the prosecution, the retaliation was to take the form of random attacks on innocent security guards and police officers.

In support of its theory, the prosecution primarily relied on the testimony of Robert Perry, a defendant herein, who actually committed the fatal shootings. Perry, who had jointed the Federal Bureau of Investigation (F.B.I.) as a confidential informant several months before Jones' trial, testified at the trial that at the June 6 red-alert meeting, Jones had ordered certain Afro Set members to commit the shootings. Perry's testimony was the key evidence linking the Afro Set members with the August 7 shootings and establishing that those members were acting at petitioner's behest. Perry was actually Jones' co-defendant in the criminal proceeding instituted by the government.

In preparing their case against Jones, the police had also questioned Victor Harvey, a fifteen year old juvenile who had been present at the August 7, 1970 shootings. Pursuant to

police questioning, Harvey prepared a written statement for police which recounted the events of that evening as he recalled them. In his statement, Harvey made no references at all to a red-alert meeting. Nor did he mention Jones' involvement in the shootings. In fact, nowhere in his written statement did Harvey mention Jones, except to identify Jones from a photograph police showed him.

The defense made specific requests for the production of Harvey's statement for possible use in the criminal proceeding. The defense made one such request at a pretrial hearing and another at the beginning of the trial. On both occasions, the prosecution refused to give defense counsel Harvey's statement, contending that the statement was neither favorable to the defense nor sufficiently material to compel production under Brady v. Maryland, 373 U.S. 83 (1963).

Ultimately, defense counsel decided not to call Harvey as a witness. Undoubtedly, counsel inferred from the prosecution's response to his production request that Harvey's testimony would have been damaging to Jones' case.

In March of 1972, at a trial before the Court of Common Pleas for Cuyahoga County, Ohio, the jury found Harllel Jones, the plaintiff herein, guilty of second-degree murder and shooting with intent to kill or wound. Plaintiff had been incarcerated upon his arrest in October of 1971, and remained so after his conviction.

B.

Subsequently, after exhausting all of the state appellate procedures, plaintiff filed with this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. After conducting an evidentiary hearing on

various claims included in the petition, this Court entered its Memorandum Opinion and Order on February 10, 1977. The Court found that plaintiff was entitled to a writ of habeas corpus based on the prosecution's suppression of the statement made by Victor Harvey. Jones v. Jago, 428 F.Supp. 405 (N.D. Ohio 1977). The Memorandum Opinion and Order was self-executing and provided for the release of plaintiff within ninety days if the State failed to institute new proceedings against him. The State did not institute new criminal proceedings. However, it did appeal this Court's decision to grant the petition for writ of habeas corpus. On April 19, 1977, the United States Court of Appeals for the Sixth Circuit granted the State's motion for a stay of judgment pending appellate review of this Court's Order granting Jones' habeas petition.

On May 3, 1978, the Sixth Circuit

affirmed this Court's decision granting the petition for writ of habeas corpus. Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978). The State then petitioned the United States Supreme Court for a writ of certiorari. The petition was denied on October 2, 1978. Jago v. Jones, 439 U.S. 883 (1978). There is nothing in the record to indicate that any stay was in effect pending the Supreme Court's ruling on the petition for writ of certiorari.

On June 24, 1977, pursuant to the Memorandum Opinion and Order entered on February 10, 1977, this Court set bond for the plaintiff, thus clearing the way for his release. In the Order of June 24th, this Court determined that

> Under the circumstances, continued imprisonment of the [plaintiff] by the state can no longer be justified. The [plaintiff] is possessed of a final judgment that his trial did not meet constitutional standards of fairness and is by now entitled to release on bail while the state pursues its appeal. (Emphasis added)

Quoted in Jago v. U.S. District Ct., 570 F.2d 618, 619 (6th Cir. 1978). The prosecution appealed plaintiff's release to the Sixth Circuit. The Sixth Circuit issued its opinion on February 2, 1978. In rejecting the prosecution's challenge to plaintiff's release, the Sixth Circuit found that:

> A consideration of the historical role of habeas corpus generally and of Rule 23 in particular persuades us that Judge Battisti retained the power to release Jones under the circumstances here.
>
> * * *
>
> Any consideration of the meaning of Rule 23 and of the retained authority of the district judge to enter orders affecting custody after filing of the notice of appeal must begin with the recognition that '[e]ssentially, the proceeding is unique'....

Jago v. U.S. District Ct., supra at 620. Furthermore, the Sixth Circuit noted in its opinion that, "Harllel Jones was actually released on June 24, 1977,

pursuant to the district court's order." Jago v. U.S. Dist. Ct., supra at 619, n. 1.

On February 12, 1979, a final order was entered by this Court unconditionally releasing Jones and removing all restrictions imposed on him by way of the Court's bond Order.

C.

On October 29, 1979, plaintiff instituted the above-captioned action, invoking jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff's complaint included fifteen (15) counts and alleged federal causes of action arising under 42 U.S.C. §§ 1983,[1]

[1] 42 U.S.C. § 1983 (1976) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state..., subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

1985(2),[2] 1985(3)[3] and 1986,[4] the First, Fourth, Sixth, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to

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shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

[2]42 U.S.C. § 1985(2) (1976) provides in pertinent part:

If two or more persons in any state...conspire...for the purpose of impeding, hindering, obstructing, or defeating, in any matter, the due course of justice in any state..., with intent to deny any citizen the equal protection of the laws....

[3]42 U.S.C. § 1985(3) (1976) provides in relevant part:

If two or more persons in any state...conspire...for the purpose of depriving, either directly or indirectly, any person...of the equal protection of the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[4]42 U.S.C. § 1986 (1976), see note 5, infra.

the United States Constitution, as well as various state claims. This action was filed against three police officers who had investigated the shootings and had amassed evidence for the criminal prosecution ("City defendants"), two F.B.I. agents who had aided in the investigation ("Federal defendants"), the county itself and the county prosecutors who had represented the State in the criminal prosecution ("County defendants"), and Robert Perry who had acted as an informant.

In essence, plaintiff's claims are based on the theory that the defendants, acting both individually and in concert, intentionally suppressed evidence which was favorable to his case, allowed perjured testimony to be presented at his trial, and caused a conflict of interest on the part of his defense counsel by making Robert Perry his co-defendant.

Plaintiff claims that these alleged activities were undertaken by the defendants with either actual or constructive notice that they were violating his constitutional rights, and that it was only through such activities that his conviction was obtained. Further, plaintiff asserts various pendent claims under such law which include malicious prosecution, false imprisonment, invasion of privacy, defamation, abuse of process and violation of state civil rights laws.

In response to plaintiff's complaint, various motions have been filed by the defendants. The County and Federal defendants have filed motions to dismiss. A motion for summary judgment is pending on behalf of the City defendants. The Magistrate, in his Report and Recommended Decision, suggested that all of the defendants

share the common defense of the statute of limitations, although such defense was not specifically raised by the County defendants. It is within the statute of limitations defense that the Court will begin its analysis.

II.

STATUTE OF LIMITATIONS DEFENSE

A. Applicable Limitations Period.

As a general rule, statutes of limitations are essential to the efficient operation of the judicial system and, as such, should be strictly construed. Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478 (1980). Statutes of limitations were never intended to be mere technical requirements subject to the manipulation of the parties. While there are numerous areas of the law wherein flexibility and discretion enter

into a court's analysis, statutes of limitations are strictly adhered to. In the instant matter, however, the statute of limitations does not offer its usual clear path to a decision.

The plaintiff has made claims that both his civil rights and constitutional rights have been violated by the defendants, acting either individually or in concert. These alleged violations fall within the realm of 42 U.S.C. §§ 1983, 1985(2), 1985(3) and 1986.[5] While

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[5] 42 U.S.C. § 1986 (1976) is governed by a one year statute of limitations. 42 U.S.C. § 1986 provides in pertinent part:

Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the

no federal statute of limitations has been prescribed to govern actions arising under 42 U.S.C. §§ 1983, 1985(2) and 1985(3), such actions are governed by the provisions of 42 U.S.C. § 1988. Relevant portions of § 1988 read as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as

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case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;... But no action under the provisions of this motion shall be sustained which is not commenced within one year after the cause of action has accrued. (Emphasis added).

> the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.... (Emphasis added.)

Specifically, § 1988 provides that common law or a consistent state statute shall apply where no federal statute of limitations has been enacted by Congress.

In applying § 1988 to civil rights actions for which there is no statute of limitations, it has been noted that "[w]hen such a void occurs, [c]ourts have repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. at 484. The Sixth Circuit has adopted this view and has specifically determined that "...the district court must apply the limitations statute of the state where it sits 'which would be applicable in the most closely analogous state action.'" Kilgore v. City of Mansfield, Ohio, 679 F.2d 632,

633-34 (6th Cir. 1983) (Citations omitted). See also Sutton v. Bloom, 710 F.2d 1188 (6th Cir. 1983); Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977); Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975); Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972). In determining the analogous statute of limitations to be applied to a particular claim for relief, the court should take into consideration the operative facts out of which the claim arises, as well as the interest that plaintiff seeks to protect. Schorle v. City of Greenhills, 524 F.Supp. 821 (S.D. Ohio 1981). This case-by-case method of analysis is appropriate in determining the statute of limitations applicable to the above-captioned cause of action.

Plaintiff, in his objections to the Magistrate's Report, relies on cases which suggest that the "borrowing" of an analogous state statute of limitations

precipitates inconsistent and confusing results.[6] Essentially, plaintiff argues that a cause of action based on civil rights legislation differs from a state cause of action in the purpose for which it was recognized by Congress and in the underlying elements which must be proven. Further, plaintiff submits that drawing analogies between each of plaintiff's claims and the common law torts encompassed within the state statutes of limitations requires "a separate analysis of each claim." See Plaintiff Jones' Objections to the Magistrate's Report and Recommended Decision, p. 6. Plaintiff claims that, for these reasons, the application of the analogous state limitations period is inappropriate in this case. The Court disagrees.

Several Ohio statutes of limitations are offered by plaintiff as those which

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[6] Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982); Shouse v. Pierce County, 559 F.2d

should be considered applicable to the instant matter. These statutes include limitations which range in length from one year to six years and apply to a variety of tort actions:

B. Parallel State Statutes of Limitations.

First, plaintiff has suggested that Ohio Revised Code § 2305.07 sets forth the applicable statute of limitations for the instant matter. The relevant portion of § 2305.07 reads as follows:

> § 2305.07 Contract not in writing.
>
> [A]n action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

The plaintiff suggests that in the event the Court rejects as the applicable limitations period the time bar set out in Ohio Rev. Code § 2305.07, Ohio Rev. Code § 2305.09 applies. Ohio Rev. Code §

1142 (9th Cir. 1977).

2305.09 provides for a four-year statute of limitations for various tort actions. That section reads in pertinent part as follows:

> §2305.09 Four years; certain torts.
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> ...(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code....

Plaintiff further suggests that Ohio Rev. Code § 2305.10 should apply in this case if §§ 2305.07 and 2305.09 are deemed inapplicable. Ohio Rev. Code § 2305.10 reads:

> § 2305.10 Bodily injury or injury to personal property.
>
> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose....

While §§ 2305.07, 2305.09, and 2305.10 encompass an array of causes of

action, they are not the most closely analogous state statutes to the federal statutes relied upon in instituting the instant civil rights matter. Nowhere in any of the aforementioned provisions of the Ohio statutes are clear state analogues to the civil rights claims underlying plaintiff's action set forth. See Board of Regents of the University of New York v. Tomanio, supra.

Ohio Rev. Code § 2305.11 sets forth another statute of limitations period. The defendants assert, and the Magistrate recommends, that § 2305.11 sets forth the time bar most analogous to the plaintiff's underlying allegations. Ohio Rev. Code § 2305.11 reads in pertinent part as follows:

> § 2305.11 Time limitations for bringing certain actions; definitions.
>
> (A) An action for libel, slander, assault, battery, malicious

> prosecution, [or] false imprisonment ...shall be brought within one year after the cause thereof accrued....

This section of the Ohio Revised Code specifically refers to actions for libel, malicious prosecution and false imprisonment, three of the main underlying claims comprising plaintiff's action. The limitations sections profered by plaintiff make no reference to any specific allegations which plaintiff set forth in his complaint and are applicable only in a general sense. Section § 2305.11 provides "[o]n its face...'the most closely analogous' limitations for the factual predicate of plaintiff's complaint..." since it explicitly sets forth actions for libel, malicious prosecution, and false imprisonment. Kilgore v. City of Mansfield, Ohio, supra at 634. This Court finds that Ohio Rev. Code § 2305.11 is the applicable statute of limitations governing plaintiff's civil rights

action. It meets the test set forth in Board of Regents of the University of New York v. Tomanio, supra. See also Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977); Carmicle v. Weddle, supra; Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964); Mason v. Owens-Illinois, Inc., supra.

C. Tolling Provisions.

The Court's conclusion that Ohio Rev. Code § 2305.11 applies to the instant matter does not exhaust consideration of the statute of limitations defense. Ohio Rev. Code § 2305.16 provides for a tolling period under certain circumstances. Section 2305.16 reads in pertinent part as follows:

> § 2305.16 Disabilities; tolling of statute of limitations.
>
> Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the

> cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed....

Plaintiff argues that the term "imprisonment" extends to more than actual confinement and includes any restraint imposed as a condition of release on bond. Defendants reject plaintiff's contention and assert that the term "imprisonment" should be narrowly construed to refer to physical imprisonment. This Court need not address this issue to rule on the motions currently before it.

Were the Court to accept as true plaintiff's assertion that "imprisonment" extends beyond confinement, the complaint in this case still would have been untimely filed. The Supreme Court denied certiorari on October 2, 1978. That Order was affirmed by Justice Stewart's refusal to suspend the denial of certiorari on October 16, 1978. The

denial of certiorari represented the highest rung on the ladder of appellate review. The State's case was effectively laid to rest when certiorari was denied. Although this Court's final Order was not issued until February 12, 1979, by virtue of the denial of certiorari, the plaintiff was free from any restraint as of October of 1978. In fact, this Court's Order of February 12, 1979, was nothing more than an administrative act to close the case file. Thus, even if the conditional release on bond tolled the running of a statute of limitations, any constraint resulting therefrom would have been removed by the denial of certiorari, the State's last appellate alternative.

The plaintiff's complaint was filed with the Court on October 29, 1979, over one year after the Supreme Court's denial of certiorari. Viewing the tolling question in a light most favorable to

plaintiff, once the Supreme Court had denied certiorari, the statute of limitations could no longer be tolled pursuant to § 2305.16 of the Ohio Rev. Code. It is on this basis that the Court grants the motion to dismiss on behalf of the Federal defendants, the motion for summary judgment on behalf of the City defendants, and dismisses Defendant Robert Perry.[7]

D. Waiver of Statute of Limitations Defense.

The next issue in the disposition of this case is whether the statute of limitations defense provided for in Ohio Rev. Code § 2305.11 was waived by the County defendants when they failed to raise it in a pre-answer motion to dismiss. In this regard, the Court must first look to Rule 8(c) of the Federal

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[7]Perry effectively raised the statute of limitations defense in his Answer to plaintiff's Complaint.

Rules of Civil Procedure for guidance. In pertinent part, Rule 8(c) reads as follows:

> In pleading[8] to a preceding pleading, a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense....

However, Rule 8(c) is somewhat modified by Rule 12(b) of the Federal Rules of Civil Procedure:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be

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[8]The term "pleadings" is defined in Rule 7(a) of the Federal Rules of Civil Procedure:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

> made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion ....

Therefore, while Rule 8(c) designates pleadings as the usual method for raising an affirmative defense, Rule 12(b) permits certain affirmative defenses to be raised by way of motion. Rule 8(c) sets forth the usual method of raising a statute of limitations defense through pleading and Rule 12(b) provides for alternative methods of raising specified defenses. When a motion to dismiss is filed prior to an answer by a party, as provided in Rule 12(c), the motion, in

effect, tolls the time period in which to file an answer or other pleading with the Court.[9]

The statute of limitations defense is not one of the affirmative defenses specifically listed in Rule 12(b) of the Federal Rules of Civil Procedure. Thus, based on a reading of the rules themselves, it remains unclear as to whether the defense of statute of limitations, in fact, is properly asserted in a motion to dismiss. Moreover, on their face, the rules do not address the question of whether a party

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[9]Rule 12(a) of the Federal Rules of Civil Procedure provides in pertinent part:

...The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

waives a statute of limitations defense when the party fails to raise it in its motion to dismiss. It is essential to consult case law analyzing the interaction of Rules 8(c) and 12(b) in order to determine what effect failure to raise the defense of statute of limitations in a pre-answer motion to dismiss has on the applicability of the defense itself.

1. Methods of Asserting Defense and Waiver.

Whether a party can raise a statute of limitations defense in a motion to dismiss varies from case to case. While it is generally accepted that this defense may be raised in such a motion, this method should only be used when a defect is apparent on the face of the complaint. Partis v. Miller Equipment Co., 324 F.Supp. 898 (N.D. Ohio 1970); Wells v. Place, 92 F.Supp. 473 (S.D. N.Y.

1950). While these cases indicate that the defense can be raised in a motion, they do not address the specific issue of whether the defense is waived if not raised in a pre-answer motion to dismiss.

Since an Ohio Code limitations period applies to the above-captioned action, this Court must look to Ohio law for guidance in resolving this issue. In 1970, prior to the effective date of the Ohio Rules of Civil Procedure, the Ohio Supreme Court, in Aetna Casualty & Surety Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N.E. 2d 237 (1970), noted that statutes of limitations are "personal privilege" defenses which are subject to waiver if not properly asserted. The Sixth Circuit in Hayden v. Ford Motor Co., 497 F.2d 1292, 1294 (6th Cir. 1974), found it necessary to expand upon the "personal privilege" theory set forth in Aetna Casualty & Surety Co. v. Hensgen, supra,

and reaffirmed the generally accepted view that "statutes of limitations are designed primarily for the benefit of persons against whom claims may be made and, in consequence, are personal privilege defenses that are waived unless asserted at the earliest possible moment."[10] The County defendants failed to raise the statute of limitations defense at the earliest possible moment. Thus, the defense has been waived and the

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[10] See also Kraushaar v. Leschin, 4 F.R.D. 143 (E.D. Pa. 1943), and 53 C.J.S. § 24 Limitations of Actions, which reads as follows:

Since a statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals, and it is regarded as a personal privilege, it is a general rule that the protection may be waived by one entitled to rely on it, unless the statutory provision is jurisdictional, or goes to the right of action, and broadly speaking the rule as to waiver applies in respect of the bar of any statute which is a mere restriction on the remedy as distinguished from a limitation on the right.

County defendants must rely on their proffered defense of immunity from civil liability as the basis of their motion to dismiss.

VI.

IMMUNITY FROM CIVIL LIABILITY

In their motion to dismiss, the County defendants argue that the County and the County prosecutor are absolutely immune from prosecution for the alleged deprivation of Jones' constitutional rights although they initiated the criminal prosecution that resulted in his conviction. Plaintiff contends that the County is not entitled to absolute immunity and that the Court must look to the functional aspects of the County's actions and not rely merely on their status as the prosecutorial arm of the government. Further, plaintiff argues that if the County is entitled to any immunity at all, it would be "qualified

immunity" rather than "absolute immunity" and, as such, would require a good faith showing on the part of the defendants in order to prevail as an affirmative defense. Specifically, plaintiff relies on Gomez v. Toledo, 446 U.S. 635 (1980), in which a police officer brought a civil rights action against the police department based upon claims of wrongful discharge and malicious criminal prosecution. The Supreme Court found that the police department was entitled to assert the defense of qualified immunity and had the initial burden of proving that all acts were done in good faith and within the scope of official duties. If a private interest was being pursued in bad faith, the cloak of immunity would not shield the official asserting the defense from civil liability. Gomez, supra at 637.

It has long been recognized that various public officials are clothed with

immunity from civil rights actions.[11] Immunity has its origins in the common law. Essentially, qualified immunity may be asserted as an affirmative defense by government officials or agenies [sic]. See Pierson v. Ray, supra at 556-557. Much like the statute of limitations defense discussed above, qualified immunity must be asserted pursuant to Rule 8(c) of the Federal Rules of Civil Procedure. Plaintiff contends that the County defendants cannot merely hide behind their status as a governmental entity, but must offer proof that their actions in pursuing his prosecution were within the scope of their public authority and were properly exercised.

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[11] Procunier v. Navarette, 434 U.S. 555 (1978)(prison officials); Imbler v. Pachtman, 424 U.S. 409 (1976)(prosecutors); Wood v. Strickland, 420 U.S. 308 (1975)(school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974)(state governor and state executive officers); Pierson v. Ray, 386 U.S. 547 (1967)(judges); Tenney v. Brandhove, 341 U.S. 367 (1951)(legislature).

After reviewing the pleadings and motions in this case, as well as the precedent in the area, the Court finds that the doctrine of absolute immunity applies to the County defendants herein and, as such, serves as a complete defense to plaintiff's claims.[12]

Historically the Supreme Court has recognized that the officers of the legal system, in order to operate efficiently, must be free from the threat of civil liability. While, initially, immunity was extended only to judges, Pierson v. Ray, supra, it quickly expanded to include government officials accorded "quasi-judicial" authority. See Scheuer

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[12] It is worthy of note that plaintiff contends that the leading case in the area of prosecutorial immunity, Imbler v. Pachtman, supra, applies strictly to actions involving claims based on § 1983. However, if this limitation were true, plaintiff's key case, Gomez v. Toledo, supra, would similarly be subjected to this narrow restriction. These cases were not intended to be applied so narrowly.

v. Rhodes, supra. The authority of prosecutors is "quasi-judicial" in nature.

The official public function of a prosecutor is to initiate and pursue criminal prosecutions. In analyzing the function of such a position, it is noteworthy that:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case.... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of his office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935), as quoted in Imbler v. Pachtman, supra at 423-424.

In essence, there is a strong precedent for shielding from civil suits prosecutors in the exercise of their public function. If such immunity did not exist, the prosecutor's office would be unable to function: Prosecutorial decision-making would be hampered by fear of exposure to civil liability. Without immunity, the prosecutors' attention would be diverted from professional responsibilities to defending themselves against innumerable claims initiated by individuals against whom criminal actions have been brought.

The Magistrate concluded, without discussion, that the County defendants were immune from plaintiff's claims because they are based on defendant's

actions as prosecutors. Specifically, the Magistrate cites Imler [sic] v. Pachtman, supra, in support of his conclusion. Plaintiff, on the other hand, argues that the claim of immunity stems only from defendants' prosecutorial "status" and not the actual activities which are the basis of the allegations contained in the complaint. The Supreme Court in Imbler held that a prosecutor enjoys absolute immunity from a § 1983 civil suit for damages for functions relating to "initiating a prosecution and [ ] presenting the State's case." 424 U.S. at 431. The Supreme Court went on to distinguish the functional nature of a prosecutor's activities from his or her status, and emphasized that its ruling encompassed those activities "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Although it did not decide the issue, the Court's discussion suggests that a

prosecutor may not be immune, or might enjoy only qualified immunity at most, for activities characterized as administrative or investigative. 424 U.S. at 430-33. Plaintiff cites many cases which, in essence, reflect the exceptions to the general rule of immunity. Most of these cases suggest that a prosecutor exposes himself to the threat of civil liability when he steps out of his generally accepted function and into an area of activity within the realm of another public official. Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd, 452 U.S. 713 (1981)(per curiam)(prosecutor authorized unlawful investigation technique); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)(prosecutor aided in raid). While these cases to indicate a significant trend toward imposing liability when a public official steps

out of his publicly proscribed role, such is not this case. The Court finds that the theory of immunity set forth in Imbler v. Pachtman, supra, applies to the instant case. No issue of material fact exists which would indicate that the County defendants were not acting within the scope of their official status as prosecutors. Throughout the course of the criminal prosecution, the county prosecutors maintained their "quasi-judicial" role and did not enter into the investi-gation [sic] of plaintiff's criminal case. Thus, the County defendants are absolutely immune from civil suit.

Finally, the County itself cannot be found liable for the acts of its employees when the employees are properly exercising their proscribed official duties. A county is not liable for the vicarious acts of its employees. See Maynard v. Kear, supra; Monell v.

Department of Social Services, 436 U.S. 658 (1978). It is under this theory that the County is dismissed as a defendant in this case.

VII.

CONCLUSION

For the reasons set forth above, it is hereby ordered that the County defendants' motion to dismiss, the Federal defendants' motion to dismiss and the City defendants' motion for summary judgment are granted. It is further ordered that the action against defendant, Robert Perry, is hereby dismissed.

IT IS SO ORDERED.

Frank J. Battisti
Chief Judge

JOURNAL ENTRY OF THE CUYAHOGA COURT OF COMMON PLEAS

STATE OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

PLAINTIFF

vs.

Harlell Jones

DEFENDANT

IN THE COURT OF COMMON PLEAS

SEPTEMBER TERM, 1978

TO-WIT: October 17 , 1978

NO. CR 01961

INDICTMENT MURDER FIRST DEGREE w/ct SHOOTING

(RECEIVED FOR FILING OCT 27, 1978)

JOURNAL ENTRY

State of Ohio present in person of John T. Corrigan Prosecutor, Attorney of Cuyahoga County or of Mr. Corrigan and

for good cause shown charge in indictment be and is hereby nolled.

James F. Kilcoyne, Judge
sd 10/20

Judge_____
VOL 337 PG 311 Journal Book

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1210

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARLLEL B. JONES,

Petitioner,

-vs-

ROBERT SHANKLAND, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF SHANKLAND AND FUERST IN OPPOSITION

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SHANKLAND AND FUERST

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court correctly followed the mandate of Wilson v. Garcia 471 U.S. 261 (1985) in choosing Ohio's intentional tort statute of limitation as the appropriate statute in 42 U.S.C. § 1983 actions, where Ohio has two statutes of limitation governing tort actions for injury to persons.

2. Whether the Circuit Court was correct in ruling that petitioner's cause of action, which alleged malicious prosecution and unconstitutional conviction, accrued no later than the date of this Court's denial of the State's petition for writ of certiorari following appeal from a final judgment granting a writ of habeus corpus.

3. Whether petitioner is entitled to a federal equitable rule, tolling operation of the statute of limitations during the period petitioner was under the restriction of bail absent any showing that the state law, limiting the disability of "imprisonment" to actual confinement, is inconsistant with the Constitution and laws of the United States.

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NO. 86-1210

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARLLEL B. JONES,

Petitioner,

-vs-

ROBERT SHANKLAND, ET AL.,

Respondents

STATEMENT OF THE CASE

The procedural genesis of this lawsuit commenced on March 28, 1972, when petitioner, Harllel Jones (hereinafter "petitioner" or "Jones") was convicted in

the Cuyahoga County Court of Common Pleas of second degree murder and shooting with intent to kill or wound. Jones was sentenced to an indeterminate life sentence and a concurrent sentence of one to twenty years. See Jones v. Jago, 428 F. Supp. 405, 406 (N.D. Ohio 1977), aff, Jones v. Jago, 575 F. 2d 1164 (6th Cir. 1978), cert. denied Jones v. Jago, 439 U.S. 883 (1978).

While incarcerated, Jones filed a petition in state court to vacate his judgment; See, State ex rel Jones v. Court of Common Pleas, 55 Ohio St. 2d 130 (1978) where Jones petitioned for a writ of mandamus to compel the common pleas court to act in connection with his motion to vacate. Jones also filed a petition for writ of habeus corpus in federal district

court which was granted on February 10, 1977. In a memorandum opinion and (self-executing) order, dated February 10, 1977, the court ruled that:

> . . .the writ shall issue and the petitioner shall be released unless within 90 days of this order the state begins new trial proceedings against him.
>
> Jones v. Jago, supra, 428 F. Supp. at 411.

Jones was released from custody on June 24, 1977 pursuant to the District Court's order. See, Jago v. U.S. District Court, 570 F. 2d 618, 619 n. 1 (6th Cir. 1978).

In Jago v. U.S. District Court, supra, the State unsuccessfully petitioned the Sixth Circuit to compel the withdrawal of the grant of bail to Jones by the District Court. The Appellate Court

overruled the petition, stating:

> The petitioner is possessed of a final judgment that his trial did not meet constitutional standards of fairness and is by now entitled, to release on bail. . .
>
> 570 F. 2d at 619 (1978) (Emphasis supplied.)

On May 3, 1978, in Jones v. Jago, 575 F. 2d 1164 (Sixth Cir. 1978), the order granting the habeas writ was affirmed. The State's petition to the Supreme Court for a writ of certiorari was denied on October 2, 1978. Jago v. Jones, 439 U.S. 883 (1978).

On October 29, 1979, nearly thirteen months after the denial of certiorari, twenty-eight months after he was released on bail and thirty-two months after the district court granted the writ, plaintiff filed the instant lawsuit

against three Cleveland Police Officers (Shankland, Mahon[1] and Fuerst), two FBI agents, Robert Perry (Jones' co-defendant at the criminal trial) several county prosecutors and Cuyahoga County. In this Complaint, Jones alleged violation of constitutional rights allegedly cognizable under 42 U.S.C. § § 1983, 1985 and 1986, as well as pendant State claims of false imprisonment, malicious prosecution, abuse of process and defamation.

In an order dated July 2, 1984, the District Court dismissed the case as to all defendants. Judge Battisti ruled that Jones failed to file this § 1983 action within the one (1) year statute of

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1. Police Officer Mahon was never served.

limitations contained in § 2305.11 of the Ohio Revised Code. The Sixth Circuit Court of Appeals affirmed in an order issued September 2, 1986. See Jones v. Shankland, 800 F. 2d 77 (6th Cir. 1986). Jones' Petition For Rehearing En Banc was denied on October 20, 1986.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DETERMINATION THAT OHIO'S ONE YEAR INTENTIONAL TORT STATUTE OF LIMITATIONS IS THE MOST APPROPRIATE FOR USE IN SECTION 1983 ACTIONS IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDING IN WILSON V. GARCIA.

Petitioner urges this Court to grant a writ of certiorari to resolve an alleged conflict among and within the circuits regarding selection of the most appropriate statute of limitations in § 1983 actions. However, petitioner's argument supports neither the language or rationale underlying this Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985). In Wilson, this Court determined that just one statute of limitations should be applied for all § 1983 actions in each

state. According to this Court, "uniformity within each State is entirely consistent with the borrowing principle contained in § 1988" 471 U.S. at 275. (Emphasis supplied).

Petitioner voices concern about a lack of unanimity among the circuits as to which statute of limitations to apply in § 1983 actions. Indeed, Jones points to an alleged conflict within the Sixth Circuit between Mulligan v. Hazard, 777 F. 2d 340 (6th Cir. 1985), cert. denied ___ U.S. ___ 106 S. Ct. 2902 (1986), where the court applied Ohio's one year intentional tort statute of limitations (Ohio Revised Code § 2305.11) and Carroll v. Wilkerson, 782 F. 2d 44 (6th Cir. 1986) cert. denied sub nom County of Wayne v. Carroll, ___

U.S. ___, 107 S. Ct. 330 (1986) where the court applied Michigan's three year statute of limitations govering personal injury claims (MCLA § 600.5805(8)).

These decisions simply do not conflict with the mandate of Wilson, where this Court determined the single best characterization for all § 1983 actions to be as "claims for personal injury" 471 U.S. at 279. Given this determination of the nature of § 1983 actions, this Court, in Wilson, selected New Mexico's three (3) year Statute of Limitations governing tort actions "for an injury to the person or reputation of any person." (N.M. Stat Ann. § 37-1-8 (1978)) as the most appropriate limitation period.

The Sixth Circuit, in Carroll v.

Wilkerson, supra, likewise had before it a Michigan statute of limitation for "personal injury" to select as the most appropriate statute under Wilson. Thus, the Sixth Circuit held, in Carroll, that the "Section 1983 action was subject to the [Michigan] three year statute of limitations for personal injury claims. . ." 782 F. 2d at 45.

However, in Mulligan v. Hazard, supra, the Appellate Court had no one statute of limitations governing injuries to person. Instead, Ohio had "two [tort] statutes of limitations relating to personal injury actions, Ohio Rev. Code § 2305.10 [for bodily injury and damage to property] and 2305.11 [governing intentional torts] 777 F. 2d at 344.

After a review of this Court's discussion in Wilson of the legislative history of the Civil Rights Act of 1871, the Mulligan Court decided that § 2305.11 of the Ohio Revised Code,

> . . . which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted the Civil Rights Sttutes.
>
> 777 F. 2d at 344.

The fact that different statutes of limitation have been selected by the federal courts for the different states in no way violates the language or policy of Wilson. Indeed, in borrowing the most appropriate state statute of limitations, the "federal law incorporates the state's

judgment on the proper balance between the policies of repose and the substantive policies of enforcement . . . " Wilson, supra, at 271.

This lack of uniformity among § 1983 statutes of limitation in the various states is, in fact, directly contemplated by § 1988. This Court stated, in Board of Regents v. Tomanio, 446 U.S. 478, 489, (1980); citing Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975):

> The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions.

See, also Robertson v. Wegmann, 326 U.S.

584, 594 n. 11 (1978):

> Whatever the value of nationwide uniformity in areas of civil right enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues. (Emphasis supplied).

Thus, lack of nationwide uniformity cannot be the basis for invocation of this Court's jurisdiction.

Furthermore, the alleged conflict between the circuits cited by petitioner in no way implicates the real policy consideration underlying Wilson v. Garcia.

The concerns voiced by this Court in Wilson dealt with the fact that

different statutes of limitation were being applied, within the same state, on a case by case basis:

> If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same state and multiple periods of limitations would often apply to the same case. Wilson, supra, at 273-74. (Emphasis supplied).

The opinion below, reaffirming the Mulligan holding that Ohio Revised Code § 2305.11, applies in all Ohio § 1983 actions, follows the policy of the Wilson decision that choosing the appropriate statute be "an uncomplicated task". Id.at 275. That other circuit courts of appeals, after reviewing entirely different state statutory schemes, have selected other statutes of limitations in no way violates the teachings of Wilson or necessitates further review by this Court.

II. PETITIONER'S CAUSE OF ACTION ALLEGING MALICIOUS PROSECUTION AN UNCONSTITUTIONAL CONVICTION ACCRUED NO LATER THAN THE DATE O THIS COURT'S DENIAL OF THE STATE'S PETITION FOR WRIT OF CERTIORAR FOLLOWING APPEAL FROM A FINA JUDGMENT GRANTING A WRIT OF HABEA CORPUS.

This Court reaffirmed in Wilson v. Garcia that the "length of the limitation period and closely related questions of tolling and application are to be governed by State law." 461 U.S. at 269 (Emphasis supplied). See also Johnson v. Railway Express Agency Inc., 421 U.S. 454, 462 (1975) Jones concedes that his cause of action is in the nature of a malicious prosecution claim; his federal claim is that he was unconstitutionally convicted.

The law in Ohio governing when the cause of action for malicious prosecution accrues is clear. In Levering v. National Bank of Morrow County, 87 Ohio St. 117 (1912), the Ohio Supreme Court held that the right to sue for malicious prosecution:

> . . . accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of, and is barred by the statute of limitations if not brought within one year after such judgment, although a proceeding in error may have intervened. Syl. Para. 2 (Emphasis provided).

Levering is still the law in Ohio. See Board of Education, Miami Trace Local School District v. Marting. 36 Ohio Ops. 2d 134, 7 Ohio Misc. 64 (C.P. Madison

1966); Baxter Travenol Laboratories v. LeMay, 536 F. Supp. 247, 248-49 (S.D. Ohio 1982).

It is axiomatic, under the rule of Levering, that when a plaintiff is convicted, and thereafter collaterally attacks that conviction, the cause of action accrues when plaintiff obtains a final judgment overturning the conviction. Thus, in the instant action, the cause of action accrued when Judge Battisti invalidated Jones' state court conviction in February of 1977. Indeed, the Sixth Circuit has characterized Levering as meaning that "the action [must be] commenced within one year following journalization of the judgment in favor of the party bringing action" Coffy v.

Multi-County Narcotics Bureau, 600 F. 2d 570, 581 n. 12 (6th Cir. 1979) (Emphasis supplied).

Jones obtained a final judgment overturning his state conviction on February 10, 1977, well over two and one-half years prior to his filing the instant lawsuit. Jones v. Jago, 428 F. Supp. 405 (N.D. Ohio 1977); See also, Jago v. U.S. District Court, 570 F. 2d 618, 619, (6th Cir. 1978).

Plaintiff's cause of action accrued on February 10, 1977, the date that the District Court granted Jones' petition for writ of habeas corpus. See Jones v. Jago, supra. The Sixth Circuit characterized Judge Battisti's self-executing order as

follows:

> "[Jones] is possessed of final judgment that his trial did not meet constitutional standards of fairness and is by now entitled to release on bail . . . Jago v. U. S. District Court, supra, 570 F. 2d 618, 619. (Emphasis supplied).

The latest date that plaintiff's cause of action arguably could have accrued was when the Supreme Court denied certiorari on October 2, 1978 or on October 16, 1978, when Justice Stewart denied the State's motion to suspend the denial of certiorari. As stated by the District Court below:

> The Supreme Court denied certiorari on October 2, 1978. That Order was

> affirmed by Justice Stewart's refusal to suspend the denial of certiorari on October 16, 1978. The denial of certiorari represented the highest rung on the ladder of appellate review. The state's case was effectively laid to rest when certiorari was denied. (Respondent's Appendix A53-54).

Plaintiff argues that his cause of action did not accrue until October 27, 1978 when the Cuyahoga County Common Pleas Court nolled the changes contained in plaintiff's original indictment or, until February 12, 1979, when Judge Battisti unconditionally released Jones and removed all bail restrictions. These arguments are simply untenable.

Whether or not the State chose to re-try Jones had absolutely nothing to do with his cause of action alleging that his 1972 conviction was unconstitutional. The District Court characterized Jones' claims, in his complaint, as follows:

> ". . . the defendants, acting both individually and in concert, intentionally supressed evidence which was favorable to his case, allowed perjured testimony to be presented at his trial . . . it was only through these activities that his conviction was obtained. (Petitioner's Appendix A40-41).

A decision by the State to re-try Jones rather than nolle the charges would not have implicated the claims alleged in Jones' complaint. The district court set aside Jones' 1972 conviction in Jones v. Jago, 428 F. Supp. 405 (N.D. Ohio 1977). Under Levering, this was certainly a "judgment for the defendant" at which time Jones' cause of action accrued under Ohio and federal law.

III. PETITIONER IS NOT ENTITLED TO A FEDERAL EQUITABLE RULE TOLLING OPERATION OF THE OHIO STATUTE OF LIMITATIONS DURING THE PERIOD HE WAS RELEASED FROM CONFINEMENT BUT UNDER THE RESTRICTION OF BAIL.

Petitioner has wisely abandoned the argument, raised throughout the proceedings below, that the disability of "imprisonment" found in Ohio Revised Code § 2305.16 tolled the statute of limitation during the period that Jones was free on bail. Instead, Petitioner now urges the Supreme Court to forge a federal equitable exception to state tolling statutes, during such times as § 1983 plaintiffs are released from incarceration under the restriction of bail.

Jones' is entitled to equitable tolling of the Ohio Statute only if the

state rule of law is "inconsistent with the Constitution and laws of the United States" Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980). Jones has fallen far short of demonstrating such an inconsistency.

This is not a case like Younger v. Harris, 401 U.S. U.S. 37 (1971) where a court is asked, in a § 1983 action, to enjoin an ongoing state criminal proceeding. Neither is this a situation like Preiser v. Rodriquez, 411 U.S. 475 (1973) where the § 1983 plaintiff seeks injunctive relief from incarceration prior to exhaustion of the habeus corpus proceedings.

And, finally, this case does not present the question, left unresolved in

Tower v. Glover 467 U.S. 914, 923 (1984) of whether,

> ". . . a Federal District Court should abstain from deciding a § 1983 suit for damages pending the collateral exhaustion of state-court attacks on the conviction itself."

Indeed, none of the cases cited by Jones are remotely on point. Jones successfully exhausted his habeus corpus remedy more than one year prior to filing the instant lawsuit. There was absolutely no federal policy in favor of defering consideration of Jones' complaint after this Court denied certiorari on October 2, 1978 and Jones' success in the habeus proceeding was complete.

This Court stated, in Robertson v.

Wegmann, 436 U.S. 584, 593 (1978), that:

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant.

Jones can point to no overriding federal policy supporting a federal equitable tolling rule, other than the fact that state law caused him to lose this lawsuit. Under the clear precedent of this Court, Jones' action was properly dismissed.

CONCLUSION

It is respectfully submitted that petitioner filed this lawsuit outside of the one year limitation period that, at all times, was in effect. No genuine issues are implicated by this appeal justifying review by the Supreme Court of the United States. For all of the foregoing reasons, Respondents Shankland and Fuerst urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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No. 86-1210

In the Supreme Court of the United States

OCTOBER TERM, 1986

HARLLEL B. JONES, PETITIONER

v.

ROBERT SHANKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining which of two Ohio statutes of limitations governing personal injury actions is to be applied to Ohio-based actions brought pursuant to 42 U.S.C. 1983.

2. Whether the court of appeals erred in determining when the statute of limitations began to run on petitioner's claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

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HARLLEL B. JONES, PETITIONER

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ROBERT SHANKLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A26) is reported at 800 F.2d 77.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1986, and rehearing was denied on October 20, 1986 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 20, 1987.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Ohio Rev. Code Ann. §§ 2305.09, 2305.10, 2305.11, and 2305.16 (Anderson 1981 & Supp. 1985) are reproduced at Pet. 2-4.

[1] Monday, January 19, 1987, was a federal legal holiday. See Rule 29.1 of the Rules of this Court.

STATEMENT

On March 28, 1972, petitioner was convicted in the Court of Common Pleas of Cuyahoga County, Ohio, of second degree murder and shooting with intent to kill or wound, and received concurrent sentences of life imprisonment and one to twenty years' imprisonment. See, *Jones* v. *Jago*, 428 F. Supp. 405, 406 (N.D. Ohio 1977), aff'd, 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978).

Thereafter, on February 10, 1977, the United States District Court for the Northern District of Ohio granted petitioner a writ of habeas corpus, which provided for petitioner's release should the State not initiate new trial proceedings against him within 90 days of the order. 428 F. Supp. at 411. Because no new proceedings were initiated, petitioner was released from custody, on bail, on June 24, 1977. See *Jago* v. *U.S. District Court*, 570 F.2d 618, 619 n.1 (6th Cir. 1978).[2] The district court's grant of habeas relief to petitioner was affirmed by the Sixth Circuit on May 3, 1978 (see 575 F.2d 1164) and the State's petition for a writ of certiorari was denied on October 2, 1978. 439 U.S. 883.[3] On February 12, 1979, the district court declared petitioner unconditionally released, thus setting aside the requirement of bail (Pet. App. A6).

On October 29, 1979, petitioner initiated the instant action against, inter alia, William M. Greene, Jr., and William Kelly, Special Agents of the Federal Bureau of Investigation, who were sued in their personal capacities.[4]

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[2] In *Jago* v. *U.S. District Court, supra,* the state unsuccessfully petitioned the Sixth Circuit to compel the withdrawal of the grant of bail to petitioner by the district court.

[3] On October 16, 1978, Justice Stewart denied the state's application for suspension of the Court's denial of certiorari (Pet. App. A25).

[4] In addition, petitioner sued three Cleveland police officers, several county prosecutors, and Cuyahoga County.

Petitioner's complaint alleged violations of various constitutional rights, claims arising under 42 U.S.C. 1983, 1985, and 1986, and pendent claims under state law for false imprisonment, malicious prosecution, abuse of process, and defamation.

Upon defendants' motion, the district court dismissed the complaint in its entirety, ruling, inter alia, that petitioner had failed to initiate his action within the period required by the applicable Ohio statute of limitations (Ohio Rev. Code Ann. § 2305.11 (Anderson 1981 & Supp. 1985).[5]

In affirming the district court, the court of appeals first found that petitioner's claims were subject to this Court's "determination in *Wilson* v. *Garcia* [471 U.S. 261] (1985), that actions under section 1983 are best characterized as personal injury actions and subject to the state statutes of limitations for those types of claims" (Pet. App. A13).[6] The court observed that the issue of which Ohio statute of limitations was to be applied under *Wilson* v. *Garcia*, 471 U.S. 261 (1985), had been settled in *Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985), cert. denied, No. 85-1641 (June 9, 1986), and, accordingly, the panel was constrained

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[5] The district court also ruled that, while the county defendants had waived the statute of limitations defense by failing properly to raise it, they were absolutely immune from liability for their conduct in prosecuting the criminal case against petitioner. The court of appeals affirmed the district court's determination of absolute immunity (Pet. App. A11-A12), and petitioner has not challenged its affirmance.

[6] While petitioner's complaint alleges injuries under 42 U.S.C. 1983, 1985, and 1986, and arguably personal claims against federal respondents for constitutional torts, as in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), neither the district court nor the court of appeals distinguished among the various claims for statute of limitations purposes. Accordingly, both courts below tested all of petitioner's claims under the statute of limitations principles established by this Court for Section 1983 claims. Petitioner has not challenged this aspect of the decision of the court of appeals.

by the law of the circuit as stare decisis (Pet. App. A13). Therefore, the court of appeals affirmed the district court's application of Ohio Rev. Code. Ann. § 2305.11 (Anderson 1981 & Supp. 1985), which provides that "[a]n action for libel, slander, assault, battery, malicious prosecution [or] false imprisonment * * * shall be brought within one year after the cause of action accrued * * *."[7]

The court of appeals next determined that the time for petitioner to initiate his action began to run no later than October 16, 1978,[8] rejecting petitioner's argument that "[t]he district court's order of February 12, 1979, in final conclusion of the habeas proceedings" (Pet. App. A25) should be the event which began the statute of limitations running. The court of appeals found that the February 12 order "was nothing more than an administrative act of closing the file," concluding (Pet. App. A25-A26):

> The result had already been fully and totally adjudicated. We see no reason to string out the time for the statute to run by conceiving of every possible method by which the ultimate result in the habeas case might have been forestalled.

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[7] In *Mulligan* the Sixth Circuit had determined that Section 2305.11 "more specifically encompasses the sorts of actions which concerned Congress as it enacted the civil rights statutes" (777 F.2d at 344).

The court of appeals also followed *Mulligan* in holding that *Wilson* v. *Garcia, supra*, was to be applied retroactively (Pet. App. A14). Petitioner has not sought review of this holding.

[8] The court of appeals observed (Pet. App. A24-A25):

> As noted by the district court, the Supreme Court denied certiorari on October 2, 1978; on October 16, 1978, Justice Stewart refused to suspend the denial of the application for writ of certiorari. Without necessarily holding that the one year period should be calculated as running from either of those dates in contrast to some earlier date, it is sufficient to say that under any reasonable construction of finality, [petitioner] had had well over a year in which to act before commencing the district court suit on October 29, 1979.

Finally, the court of appeals found that Ohio's tolling statute was applicable "to the extent [it is] not inconsistent with federal policy underlying section 1983" (Pet. App. A15). Absent any such inconsistency, the court of appeals held that Ohio Rev. Code Ann. § 2305.16 (Anderson 1981), which tolls the time for bringing actions under, inter alia, Ohio Rev. Code Ann. § 2305.11 (Anderson 1981 & Supp. 1985), "if a person * * * is, at the time the cause of action accrues, * * * imprisoned [until] after such disability is removed," does not contemplate tolling during time spent out of prison on bail (Pet. App. A16).

Accordingly, the court of appeals affirmed dismissal of petitioner's complaint on statute of limitations grounds, holding that Ohio's one-year statute of limitations for personal injury applied, and that the time for petitioner to bring this action had begun to run no later than this Court's denial of the State's petition for certiorari challenging the writ of habeas corpus—more than one year before petitioner initiated this action.

ARGUMENT

Petitioner contends that further review of this case is warranted because the court of appeals incorrectly applied the principles of *Wilson* v. *Garcia* when selecting the statute of limitations governing the timeliness of petitioner's complaint, and because the court of appeals incorrectly determined the latest date at which the statute of limitations began to run on petitioner's claims. The decision of the court of appeals was correct on each issue, however, and there is no conflict with any decision of this Court or of any other court of appeals meriting resolution by this Court. Accordingly, further review is not warranted.

1. In *Wilson* v. *Garcia* this Court held that one statute of limitations should be applied for all Section 1983 actions in a state (471 U.S. at 275), and that Section 1983 ac-

tions are to be characterized "as involving claims for personal injuries" (471 U.S. at 279). Petitioner does not claim that these principles have not been followed by the court of appeals herein; he claims only that its choice between Ohio's two statutes governing the time in which "claims for personal injuries" must be raised, is in conflict with the decisions of other circuits. No conflict necessitating review exists, however.[9]

The petitioner cites various decisions in which other courts of appeals have selected, as did the court of appeals herein, one of two state statutes of limitations meeting *Wilson*'s requirement that the statute chosen govern actions characterized "as involving claims for personal injuries" (471 U.S. at 279).[10] In addition, petitioner claims a conflict exists within the Sixth Circuit itself between *Mulligan* v. *Hazard, supra*, and *Carroll* v. *Wilkerson*, 782 F.2d 44 (1986), cert. denied *sub nom. County of Wayne* v. *Carroll*, No. 86-158 (Oct. 20, 1986).[11]

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[9] Significantly, the court below simply followed its previous decision in *Mulligan*, which settled for the circuit the precise question as to Ohio law raised in this case; certiorari was denied in *Mulligan* on this issue (No. 85-1641) (June 9, 1986)). There is no reason for any different result here.

[10] See Pet. 10-13, citing *Banks* v. *Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986); *Small* v. *Inhabitants of Belfast*, 796 F.2d 544 (1st Cir. 1986); *Villante* v. *Department of Corrections*, 786 F.2d 516 (2d Cir. 1986); *Farmer* v. *Cook*, 782 F.2d 780 (8th Cir. 1986); *Mismash* v. *Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1052 (1985); *Hamilton* v. *City of Overland Park*, 730 F.2d 613 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1052 (1985); *McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984) (en banc); *Gates* v. *Spinks*, 771 F.2d 916 (5th Cir.), cert. denied, No. 85-1215 (Mar. 10, 1986); *Jones* v. *Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), cert. denied, No. 85-794 (Jan. 27, 1986).

[11] In *Carroll* the Sixth Circuit had to choose between two Michigan statutes arguably governing claims for personal injuries. See *County of Wayne* v. *Carroll, supra* (Justice White, dissenting).

That the courts of appeals have applied seemingly dissimilar statutes of limitations does not, however, indicate that there exists the kind of conflict among the circuits which warrants review. Rather, it reflects the inescapable fact that among the more than fifty jurisdictions, in each of which *one* statute of limitations governing claims for personal injuries must be chosen, there exists a wide variety of such statutes from which to choose. Indeed, given that wide variety—the various statutes created by the states are more appropriately described by their differences than their similarities—it would seem impractical to attempt to fashion a rule more precise than the direction already established by this Court in *Wilson*.[12]

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[12] *Mulligan* v. *Hazard, supra*, demonstrates this point. Petitioner's asserted conflict among the circuits is based on the theory that the court's choice is simply between statutes governing intentional torts and those governing non-intentional torts (Pet. 15). However, as the court of appeals noted in *Mulligan*, "both [statutes] theoretically encompass intentional tort actions" (777 F.2d at 344). The fact of the matter is that the states have differentiated their statutes on the basis of various distinctions. Thus, the kind of uniformity petitioner seeks would be entirely artificial and, moreover, might not even be possible without doing serious damage to the meaning of several state statutes of limitations through the use of an entirely unnecessary Procrustean device. The cases petitioner cites (Pet. 10-13) themselves are illustrative. See, *e.g.*, *Banks* v. *Chesapeake & Potomac Telephone Co.*, 802 F.2d at 1426 (choosing between D.C. Code Ann. § 12-301(4) (1981))—applicable to actions for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—§ 12-301(8)—applicable to all other claims for personal injuries—and § 1-2544—the statute of limitations in the D.C. Human Rights Act); *Small* v. *Inhabitants of Belfast*, 796 F.2d at 545-546 (choosing between Me. Rev. Stat. Ann. tit. 14, § 753 (1980))—applicable to defamation, assault and battery, false imprisonment and medical malpractice—and Me. Rev. Stat. Ann. tit. 14, § 752 (1980), applicable to all other personal injury claims except those instituted against certain professionals); *Gates* v. *Spinks*, 771 F.2d at 919 (choosing between Miss. Code Ann. § 15-1-35 (1972))—applicable to actions for assault, assault and battery, maim-

Moreover, to ignore the differences among the state statutes would violate this Court's express direction in *Wilson* that, in borrowing the most appropriate state statute of limitations, the "federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement" (471 U.S. at 271). Indeed, the wide variety in state legislation available to govern Section 1983 claims has been repeatedly noted by this Court:

> The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions.

Boards of Regents v. *Tomanio*, 446 U.S. 478, 489 (1980), citing *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[13]

Thus, this Court has not contemplated that the choices among state statutes will lead to uniform results—except that in any one state, only one statute of limitations may govern Section 1983 actions. The seemingly differing

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ing, false imprisonment, malicious arrest, menace, and all actions for slanderous words or libel—and Miss. Code Ann. § 15-1-49 (1972)—applicable to all actions not otherwise provided for, including many actions not based on tort); *Jones* v. *Preuit & Mauldin*, 763 F.2d at 1253-1254 (choosing between Ala. Code § 6-2-34(1) (1977))—applicable to actions "for any trespass to person or liberty, such as false imprisonment or assault and battery"—and Ala. Code § 6-2-39(a)(5) (1977)—applicable to actions for "any injury to the person or rights of another not arising from contract and not specifically enumerated").

[13] See also *Robertson* v. *Wegmann*, 436 U.S. 584, 594 n.11 (1978):

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

choices as *between* the states are products of the vast differences in the options which have been presented by the various state statutes; these choices must necessarily be made on a state-by-state basis. The varied choices, therefore, do not present the kind of conflict among the circuits this Court needs to resolve, but rather result from the multi-state federalism created by the Constitution.

2. Petitioner offers two theories in support of his contention that the Court should review further the determination of when the statute of limitations began to run on petitioner's claims. First, he argues that the time should not begin to run until after the State could no longer seek relief in district court from the habeas corpus judgment (Pet. 22). Second, he contends that a federal equitable tolling principle should be fashioned to replace the state tolling statute used below (Pet. 29-31).[14] Neither of these arguments, however, supports further review of the question of when petitioner's time began to run.

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[14] Petitioner suggests that the court of appeals "assum[ed] without deciding that a federal equitable rule applied * * * ([Pet. App.] A24-25)" (Pet. 26) and "rul[ed] that Petitioner's § 1983 action was untimely, even if a federal tolling principle applied" (Pet. 30). This suggestion appears to be disingenuous, at best. The citation in the petition purportedly supporting it—"A24-25"—refers to the conclusion of the court of appeals that "under any reasonable construction of finality, [petitioner] had had well over a year in which to act before commencing the district court suit" (Pet. App. A25). This concludes the court's discussion of whether "abstention pending the resolution of state proceedings was appropriate" when a Section 1983 suit has been brought and a state proceeding giving rise to the federal claim is still pending. See, Pet. App. A17-A24. The court of appeals concluded (Pet. App. A24):

> We need not, however, decide here whether a dismissal without prejudice or the retention while abstaining from action is preferable for we determine that in all events the habeas corpus case had been fully concluded more than one year before the suit was started.

Refusing to decide an irrelevant abstention issue clearly does not propound a federal equitable tolling principle.

First, petitioner nowhere suggests that a conflict with any decision of any appellate court has been created by the court of appeals' decision on this issue. Indeed, petitioner concedes, in discussing his first theory, that it "appears to be an issue of first impression" (Pet. 19), and he refers to no case that addresses the second theory. Moreover, the court of appeals was correct in its determination of when petitioner's time began to run.

At bottom, the only basis for petitioner's claim that the court of appeals was incorrect is the argument that somehow petitioner's condition between the time the State's petition for a writ of certiorari was denied—the latest date chosen by the court of appeals to begin the running of petitioner's time—and the time the district court closed the habeas file on February 12, 1979, was such that he could not reasonably be required to bring his action during that time. Petitioner claims only that "until [February 12, 1979] there remained some threat of prosecution" (Pet. 31), and that petitioner "would face the risk of retaliatory reprosecution for having filed suit" (Pet. 32).

Even assuming these observations to be valid, neither creates an issue of constitutional dimension, nor supports the creation of federal tolling principles. In order for petitioner to prevail, these factors would have to present sufficient bases for abandoning this Court's rule that state tolling law must be applied to Section 1983 cases unless it is "inconsistent with the Constitution and laws of the United States." *Board of Regents* v. *Tomanio*, 446 U.S. at 485 (citation omitted). No such showing has been made. Indeed, in correctly recognizing that, "logic does not support" such a claim, the court of appeals pointed out (Pet. App. A16):

> The concerns prompting the tolling of a statute while one is in prison simply are not applicable when the party is free on bail. He is thereafter not denied

any access to counsel, nor is he hindered from investigating the facts concerning his claim or from starting suit on his own behalf.

There is accordingly no reason to believe that state law does not adequately protect any constitutional rights implicated here, by providing for tolling where appropriate to protect due process rights, or the right to counsel. Therefore, there exist no special federal concerns that argue in favor of replacing the state law with federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 86-1210

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HARLLEL B. JONES,
Petitioner,
vs.
ROBERT SHANKLAND, et al.,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF THE CASE

Though the parties appear to be in substantial agreement with respect to the procedural history of the case, there is one significant matter upon which there is dispute. Respondents Shankland and Fuerst label Chief Judge Battisti's February 10, 1977, order as "self-executing" (Brief of Shankland and Fuerst in Opposition, p. 3).

It was in fact only executory. This is borne out by the language of the order itself; a comparison with the language of orders of this Court that are, in fact, self-executing, **e.g., Lashley v. Missouri**, ___ U.S. ___, 55 L.W. 3641 (1987) (Blackmun, Circuit Justice); the contingent nature of such orders, **e.g., Gardner v. Forister**, 472 F. Supp. 1 (W.D. N.C. 1979), **Bruce v. Estelle**, 707 F.2d 155 (5th Cir.), **cert. den.** 104 S.Ct. 400 (1983); and the fact that, in actuality,

Mr. Jones was not released from the restrictions of bail and the writ was not made unconditional until Judge Battisti's subsequent Order of February 12, 1979.

I.

A claim sounding in malicious prosecution for relief under 42 U.S.C. § 1983 accrues upon the granting of an unconditional grant of habeas corpus.

Respondents Shankland and Fuerst argue that any claims of Mr. Jones that may be analogous to malicious prosecution arose sometime between February 10, 1977, when the District Court granted Mr. Jones' petition, and October 2, 1978, when this Court denied the State's petition for writ of certiorari. That argument is based upon **Levering v. National Bank of Morrow County**, 87 Ohio St. 117 (1912).

However, in making that argument, the Respondents ignore the holding of **Levering** which specifically holds that the cause of action does not arise until the case has been terminated in the court in which the first suit arose in favor of the civil plaintiff. A quotation in the

Brief of the City Defendants from **Levering** on page 17 indicates that the right to sue for malicious prosecution:

> ". . . **accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of**, and is barred by the statute of limitations as not brought within one year after such judgment, although a proceeding in error may have intervened . . . ."

In their brief the bolded portion that appears above is not emphasized and the latter portion starting with "is barred" is emphasized. However, by focusing upon the former portion of their own quotation, one can see that a cause of action for malicious prosecution does not arise until a judgment is received in the initial court.

The Federal Respondents suggest that since it is admitted that this issue is one of first impression and since there is no demonstrated conflict among the

Federal Circuits, this case does not merit review. In so arguing, the Federal Respondents ignore the fact that Rule 17.1(c) of the Rules of this Court specifically provide that important cases of first impression are cases which may merit review by this Court. Further, the Federal Respondents ignore the fact that the decision of the Sixth Circuit below upon this issue conflicts with that of the Ohio Supreme Court in **Levering v. National Bank of Morrow County**, 87 Ohio St. 117 (1912). This, too, is a basis for granting review. **See** Supreme Court Rule 17.1(a).

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